90-1978

No. 90-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

JOSE L. ROY,

Petitioner,

vs.

AMOCO OIL COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit, And Appendix to Petition

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the limitations period for filing an administrative charge of age discrimination under § 7(d)(2) of the Age Discrimination in Employment Act [ADEA][1] commence when the employer coerces an employee into accepting early retirement scheduled for a future date, or does it commence when the employer later coerces the employee into accomplishing the "scheduled" retirement via an ostensibly voluntary early retirement incentive program, where (a) the employee has repudiated his earlier-coerced acceptance prior to actual retirement; and (b) no remaining legitimate business reason exists for termination or for requiring the employee to retire as "scheduled?"

2. Does a series of events consisting of (a) an employee's coerced agreement to retire in the future; (b) the employer's later adoption of an ostensibly voluntary early retirement/termination incentive program which the employee must accept in order to secure severance benefits; (c) the employee's repudiation of his earlier-coerced agreement prior to retirement; and (d) separate coercion applied by the employer to secure the employee's retirement via the incentive program constitute a "continuing violation" for purposes of determining the timeliness of an administrative charge of age discrimination under § 7(d)(2) of the ADEA where the employer has forced other employees to enter into the incentive program on the basis of age?

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[1] 29 USC §626(d)(2)

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INTRODUCTION

Petitioner JOSE L. ROY respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered against him on January 28, 1991. All parties to the proceedings below appear in the caption of this petition.

OPINIONS BELOW

The judgment of the Court of Appeals is reproduced in the Appendix at 1a. That Court wrote no opinion. The opinion of the District Court is reported at 747 F. Supp. 661 (S.D. Fla. 1990); and at 52 FEP Cases 1339 (BNA). It is reproduced in the Appendix at 1a.

JURISDICTION

The Court of Appeals entered its judgment on January 28, 1991. ROY filed a timely Petition for Rehearing and Suggestion of *en banc* Consideration Upon Rehearing which was denied April 3, 1991. The instant petition is filed within 90 days of that date and is therefore tiinely under Supreme Court Rule 13.4. This Court has jurisdiction under 28 USC §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves §2, §4(f)(2) and §7(d)(2) of the Age Discrimination in Employment Act, 29 USC §§621,

623(f)(2) and 626(d)(2). These provisions are reproduced in the Appendix at 65a.

STATEMENT OF THE CASE

On March 21, 1989 Plaintiff JOSE L. ROY filed a complaint pursuant to §7(c) of the Age Discrimination in Employment Act, 29 USC §626(c) against Defendant AMOCO OIL COMPANY. (App. at 19a *et seq.*) The complaint alleged that on October 27, 1987 ROY was forced to enter into AMOCO's "Work Force Reduction Program"[2] under the terms of which ROY's employment as a territory manager was being eliminated effective January 1, 1988. (24a) The complaint further alleged that the "Work Force Reduction Program" [WFRP] was a subterfuge to evade the ADEA. (24a ¶14)

On April 18, 1990 the District Court entered Final Summary Judgment in favor of AMOCO holding that ROY's EEOC charge of discrimination, filed August 1, 1988, was untimely. Except as otherwise noted, the operative facts are stated within the District Court's opinion which is found in the Appendix at 4a. They may be summarized as follows.

JOSE ROY was continuously employed by AMOCO from July 15, 1955 until January 1, 1988. (6a) On September 24, 1986 ROY signed a letter, under threat of termination for misconduct, by which he agreed to retire. (9a) The effective date of ROY's retirement was to be

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[2] Which was used as an early retirement/termination incentive program. See App. at 49a-64a.

January 1, 1988. (*Id.*) In the interim, ROY was assigned to AMOCO's "EPICS" program.[3] The letter reserved to AMOCO the discretion to extend ROY's employment if the "EPICS" program continued past that date. (47a)

In April, 1987, seven months after ROY signed the agreement, he received the WFRP document. ROY was required to sign the WFRP agreeing to sever his employment by way of early retirement and to release his legal rights in order to obtain severance benefits which the company had agreed to provide him in the 09/24/86 letter. (Op. 7) ROY refused to sign the WFRP; and he thereafter engaged in an "adversarial battle" with AMOCO about it. (9a)

Record evidence shows that on at least several occasions ROY repudiated his agreement to retire, expressed his intent to continue working, and communicated that intent to AMOCO. (41a ¶8; 42a ¶9) The District Court acknowledged that ROY had made "continuing requests to continue in employ with AMOCO." (17a)

On October 27, 1987 ROY was presented with the WFRP, and told to sign it by R. Kent Carson, AMOCO's Manager of Human Resources for East Zone Marketing. ROY initially refused to sign the WFRP, again expressing his intent not to retire, and requested to know the consequences if he did not. Carson said that if ROY did not sign the WFRP he would not be employed by AMOCO after January 1, 1988; he would receive no severance

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[3] Training AMOCO's retail dealers in a new electronic sales processing system.

benefits; and he would not receive a "consulting position" AMOCO had promised to him upon his retirement. (43a ¶13) The lower courts did not comment on this evidence.

In their pretrial stipulation the parties stipulated that ROY's separation from employment was not based upon unsatisfactory job performance (30a ¶k); that ROY was qualified to hold the positions for which he was employed (30a ¶l); that forced retirement of an employee in ROY's position would constitute a violation of the ADEA (31a ¶7(b)); and that ROY's separation from employment was not the result of a reduction in AMOCO's work force. (*Id.* at ¶7(c)) It is undisputed that the EPICS program continues to this day.

The District Court dismissed ROY's suit on AMOCO's Motion for Summary Judgment on the ground that ROY's administrative charge of age discrimination, filed August 1, 1988, was untimely under §7(d)(2) of the ADEA. First, the Court found that AMOCO's "discriminatory act" of which ROY complained occurred September 24, 1986 when ROY had signed the letter by which he agreed to retire in 15 months (675 days before he filed his charge) rather than on October 27, 1987 when ROY was forced to enter into the WFRP (277 days before he filed his charge). The Court reasoned that once ROY executed the 1986 letter, the termination of his employment through retirement was "a delayed, but inevitable consequence" of that coerced agreement. (16a)

The rationale upon which the District Court relied was enunciated by this Court in *Delaware State College vs. Ricks*, 449 US 250 (1980) and *Chardon vs. Fernandez*, 454 US

6 (1981). In each case, this Court held that the unlawful acts complained of consisted of an employer's decision to terminate and the notice of that decision to the employee. (15a)

Second, the District Court found that AMOCO's violation was not "continuing" in nature because a continuing violation may not be established merely by allegations that the Plaintiff continues to suffer from the "ongoing effects of some past act of discrimination." (17a) The Court relied for its reasoning upon this Court's decision in *United Airlines, Inc. vs. Evans*, 431 US 553 (1977) which stated that:

> "The emphasis should not be placed on mere continuity; the critical question is whether any present violation exists." (*Id.*)

Although ROY had expressed an intent not to retire, and although no business reasons existed for ROY's termination in 1987, the District Court concluded that:

> "ROY's continuing requests to continue in employ with AMOCO failed to reactivate the alleged discriminatory act for the purposes of the statute of limitations." (*Id.*)

The Court of Appeals affirmed the District Court's dismissal without opinion (1a) and denied rehearing. (2a) This petition follows.

REASONS FOR GRANTING THE WRIT

This case falls squarely within Rule 10.1(c) of the Rules of this Court, in that the Court of Appeals "has decided an important question of federal law which has

not been, but should be, settled by this Court," *and* "has decided a federal question in a way that conflicts with applicable decisions of this Court."

The decision of the District Court and its approval by the Court of Appeals raises several disturbing questions of critical importance to litigants in ADEA actions based upon forced retirement accomplished under an ostensibly voluntary early retirement/termination incentive program. This case stands for the proposition that a coerced agreement by an employee to retire at some future date is equivalent to an employer's notice of termination for determining timeliness of administrative charges of age discrimination, even though the incentive program through which the retirement was accomplished was executed under separate coercion within the administrative limitations period. This ignores the fundamental distinction between coerced retirement and an employer's decision to terminate which warrants review by this Court.

In *Western Airlines, Inc. vs. Criswell*, 472 US 400 (1985) this Court reaffirmed that blanket mandatory retirement programs are specifically prohibited by the ADEA:

> "The legislative history of the 1978 amendments to the ADEA makes quite clear that the policies and substantive provisions of the act apply with especial force in the case of mandatory retirement provisions . . . " 472 US at 410.

Absent an unlawful mandatory retirement program, an employee's retirement must be secured on an individual basis through his consent under §4(f)(2) of the ADEA.[4]

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[4] 29 USC §163(f)(2). While this case antedates the 1990 amendments to the ADEA, the current §4(f)(2)(B) preserves this premise with even greater force.

Thus, an ADEA violation of forced retirement entails three distinct components: (1) The act of retirement; (2) Through consent of the employee; (3) Which is secured by coercion exerted by the employer. Unless there exists legitimate justification for termination of the employment relationship unrelated to age,[5] an employee's decision to retire is exclusively his own: Until actual retirement, absent legitimate business reasons for termination, an employee may withdraw his consent at any time and continue working.

The 1978 amendments to the ADEA prompted a dramatic rise in the number of early retirement/termination incentive programs used by employers to encourage individuals to depart employment voluntarily through the provision of additional financial incentives. These ostensibly voluntary programs have been frequently used as a vehicle to coerce an employee into retiring. The abuse of these programs by employers to mask unlawful age-based discrimination has prompted Congress to enact Title II of the Older Workers' Protection Act, P.L. 101-433, 104 Stat. 983 (Oct. 16, 1990) (69a) to define the circumstances under which releases incorporated within an

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[5] Such as termination for cause; elimination of position; lack of qualifications; reduction in force; or replacement of the employee in reliance upon his earlier notice of retirement

early retirement incentive program (such as AMOCO's WFRP) have been unlawfully coerced.[6]

Hence, in determining when the unlawful conduct occurred for limitations purposes the central focus should properly be placed upon the intent of the employee and when it was coerced. Where an employee's employment is terminated by way of retirement, where the employee had previously consented to retire; later revoked that consent; and thereafter again ostensibly-voluntarily agreed to retire by entry into an early retirement incentive program, it is thus necessary to determine whether coercive conduct occurred at the time of the employee's last expression of consent to determine whether (a) that final expression of consent was voluntary or coerced; and (b) whether legitimate business justifications existed for requiring the employee to adhere to his earlier expression of consent.[7]

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[6] AMOCO raised the release contained within its WFRP as a defense below. That release was executed October 27, 1987. The question of whether it was voluntary or coerced was never addressed by either the District Court or the Court of Appeal; and that issue is therefore not ripe for review. See *Baker vs. Carr*, 369 US 186, 198 N. 16 (1962) Accordingly, a disputed issue of material fact remains as to whether ROY was unlawfully coerced into entering into the WFRP on October 27, 1987, the date ROY contends the limitations period should have commenced. (30a, ¶6(e))

[7] No justification was proffered by AMOCO for forcing ROY to execute the WFRP. To the contrary, it was undisputed that the position of EPICS Coordinator held by ROY continues to exist; and the parties stipulated that ROY was not terminated for cause, and that ROY's severance of employment was not occasioned by a reduction in its work force.

By ignoring the unlawful coercion applied to ROY on the date he executed the WFRP in the face of his expressed desire to continue working, the District Court and Court of Appeal have fashioned a new rule for charge-filing purposes which ignores the very conduct which it is the intent of the ADEA to prohibit, and which thereby sanctions a new, insidious form of age-based discrimination in evasion of the ADEA.

Neither this Court nor, to petitioner's knowledge, any Court other than those below have ever directly held that discrete unlawful conduct may be characterized for charge-filing purposes under either Title VII or the ADEA as a mere "delayed, but inevitable consequence" of an earlier unlawful act. This is a new rule peculiar to this case.

Moreover, to petitioner's knowledge neither this Court nor any other has held that the ADEA's charge-filing requirement commences on the date of an earlier-coerced "agreement" to retire *in futuro* as opposed to the date the employer separately forces the employee to implement the "agreement" by way of an early retirement incentive program, at a time when no legitimate business reasons remain for doing so.

Finally, this Court has never addressed the question whether a series of unlawful acts designed to effect an employee's retirement; or an employer's coerced imposition of an early retirement incentive program upon a series of employees, including complainant, on the basis of age; may constitute a "continuing violation" of the ADEA. This case holds that there may be but one violation only.

The answers to these novel questions are necessary to harmonize this Court's prior decisions with the purposes of the ADEA. They are especially necessary given the fashionable abuse of early retirement incentive programs as a device to reduce an employer's work force which, as Congress has recognized, have been used to coerce retirement in violation of the 'ADEA.

Accordingly, this petition presents issues warranting review by this Court.

I. THE REASONING USED BY THE LOWER COURTS TO SANCTION THE 1987 COERCION IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND WOULD PERMIT EMPLOYERS TO VIOLATE THE ADEA WITH IMPUNITY

1. The inevitable result of the reasoning process in this case permits employers to impose group-based mandatory retirement programs outlawed in *Criswell* on an individual basis. Unlike other forms of employment discrimination prohibited by Title VII of the Civil Rights Act of 1964, 29 USC §2000(e), *et seq.*, the ADEA protects employees only at a time when coverage attaches: that is, when they reach age 40. 29 USC §631(a). A minority always was and always will be one and thus receives protection; however, a person becomes protected by the ADEA only with time.

Because of this distinction, and because the coercive conduct committed by AMOCO when ROY executed the WFRP in 1987 was disregarded by both the District Court and the Court of Appeals, employers are now free to coerce individual employees under age 40 into executing

"agreements" to retire at some point *in futuro* when the Act's protections would otherwise apply. Worse, employers are now free to *notify* unprotected employees of their intent to *force* the employees into retiring at a time when protection has attached. They may now coerce implementation of those agreements or notices with impunity at a time when coverage has attached, even though the employee wishes to continue working; no lawful reason exists for termination of the employee at that time; and it is necessary to secure retirement/termination through separate coercive acts *which would themselves be unlawful if the previous coercion had not occurred.* This is so because, by declaring such separate coercive conduct in 1987 the "inevitable consequence" of the 1986 coerced agreement, both lower courts have, in effect, declared that the later, separate, and timely coercion of ROY was not an unlawful act of which ROY could complain.

This result flies directly in the face of *Ricks* and *Chardon,* the very decisions upon which the lower courts purport to rely. Those cases themselves turn on the *absence* of *additional* discriminatory conduct after the termination decision was made. As the Court held in *Ricks*:

> "If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that occurred until, or occurred at the time of, the actual termination of his employment. But the Complaint alleges no such facts."
>
> * * *
>
> "The emphasis is not upon the effects of earlier employment decisions; rather it is [upon]

> whether any present *violation* exists." 449 US at 258 (emphasis in original)

Similarly, this Court said in *Chardon*:

> "There were no other allegations, either in *Ricks* or in these cases, of illegal acts subsequent to the date on which the decisions to terminate were made." 454 US at 8

Both *Ricks* and *Chardon* held that *neutral* employment practices which passively perpetuate the consequences of time-bared discrimination *but which are themselves not bred of discriminatory intent* do not constitute actionable wrongs which start the limitations clock ticking. But neither case suggests the result here: that new coercive conduct committed *in order to discriminate* may not start the clock ticking anew.

Hence, by ignoring AMOCO's new coercive conduct applied to ROY on October 27, 1987, prior to his retirement date of January 1, 1988, in the face of ROY's expression of his desire to continue working, when no legitimate reason for ROY's termination remained, the lower courts have *sub silentio* sanctioned a new form of mandatory retirement program by merely permitting the employer to shift its unlawful retirement policy from the group to the individual: in each case the employer's notice of discriminatory intent is manifested at a prior point in time; and in each case it is implemented through coercion at a subsequent point in time.

The reliance of the lower courts upon *Ricks* and *Chardon* is therefore completely misplaced. Their decisions are, in reality, in direct contravention of *Ricks* and *Chardon*. And they present serious policy problems under the ADEA.

2. If the result approved by the lower courts *does* flow from *Ricks* and *Chardon,* then petitioner respectfully suggests that their rationale should be re-examined and limited. The "notice" to ROY occurred *fifteen months* prior to his actual retirement date. Within that fifteen month period the following events occurred:

a. ROY was reassigned to a new position – EPICS Coordinator – at no loss in pay. He does not complain about that.

b. In the 1986 letter AMOCO promised to reconsider the prospects for ROY's continued employment if the EPICS project continued. (47a)

c. AMOCO adopted a corporate-wide WFRP. This program "superseded and replaced" prior severance programs.

d. ROY expressed his desire to continue working.

e. AMOCO forced other employees to terminate their employment *via* the WFRP based on age.

f. ROY was required to sign the WFRP and its release in order to obtain severance benefits.

g. AMOCO coerced ROY into signing the WFRP under threat of termination and loss of benefits, even though

h. *the EPICS program continued;* and ROY's performance within it prior to his retirement was exemplary. *AMOCO did not reconsider ROY's continued employment as promised.*

i. ROY retired two months later.

If events such as these, which obviously did not exist in 1986, are held to constitute mere "delayed, but inevitable consequences" of coercion thirteen months old under *Ricks* and *Chardon*, then this Court approves the concept that changed circumstances which alter the employee's decision-making process for retirement purposes and which may completely remove an employer's business-justification defense to prior conduct are of no consequence in determining whether a violation exists. Assuming *arguendo* that ROY's 1986 agreement to retire was unlawfully coerced,[8] at least at that time AMOCO had an arguable business reason for giving ROY the choice of termination or retirement: job misconduct. But *no* legitimate reason existed for forcing ROY to retire in 1987.

Unlike the teachers in *Ricks* and *Chardon*, ROY was not employed on an annual contract basis: his employment was continuing in nature. And unlike the issuance of a terminal contract *following* the employers' final decision denying tenure in *Ricks* and *Chardon*, AMOCO *reserved* final decision with regard to ROY if the EPICS program continued. (47a)

Extension of denial-of-tenure and terminal-contract standards to a continuing employment situation in the face of changed employment circumstances under the *Ricks* and *Chardon* rationale warrants review and reconsideration of that rationale by this Court – if for no other reason than to advise employees where that rationale begins and ends; but more important, to prevent

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[8] which AMOCO vehemently denied, and which remained in dispute when summary judgment was granted (See 30a ¶6(d))

employers from wielding time-barred unlawful conduct as a sword to commit further violations of the ADEA without fear of penalty.

II. THE SERIES OF EVENTS CULMINATING IN ROY'S 1987 EXECUTION OF THE WFRP AND CONSEQUENT RETIREMENT IN 1988 CONSTITUTES A CONTINUING VIOLATION OF THE ADEA WHERE AMOCO HAD USED THE WFRP AS A DEVICE TO COERCE OTHER EMPLOYEES TO RETIRE BECAUSE OF AGE

Other Courts have recognized that "continuing" violations of the ADEA may exist for charge-filing purposes. These consist of either a company-wide policy of discrimination, or a series of related events taken against a single individual, which culminate at a certain point in time. *Bruno vs. Western Electric Co.*, 829 F.2d 957 (10th Cir. 1987) Both forms exist here: the company-wide policy (as manifested by AMOCO's use of the WFRP to force other individuals to retire) (31a ¶6(f) and (h)), and the series of events (taken against ROY which culminated in his coerced acceptance of the WFRP and consequent retirement) (Point I, *supra*).

The policy may have been adopted or the events occurred outside the charge-filing period, as long as the employer continues to apply the discriminatory policy or commit discriminatory conduct at a point within the filing period and the claimant is not merely complaining of the lingering effects of past conduct which had been completed outside the filing period, as in *Ricks* and *Chardon*. This means that there must be at least one instance of discriminatory conduct within the filing period for the

"continuing violation" theory to apply. *Furr vs. AT&T Technologies, Inc.*, 824 F.2d 1537 (10th Cir. 1987).

At the time summary judgment was granted AMOCO and ROY had agreed in their pretrial stipulation that disputed issues of fact remained as to whether, as ROY had alleged in his complaint, (21a ¶13(a-e)) his forced retirement was part of an elaborate, subtle and sophisticated scheme by AMOCO to rid itself of its older employees under the WFRP; (See App. at 31a ¶6(f)) and issues of law remained as to whether the WFRP was a subterfuge to evade the purposes and policies of the ADEA. (33a ¶(b))

The circumstances surrounding three other employees terminated under the WFRP assertedly on the basis of their age – Pelt, Quast, and Fugua – were also in dispute when summary judgment was granted. (32a ¶8(B)(d))

In *Evans, supra,* this Court accepted in theory the concept of "continuing violation" as applied to Title VII violations, but rejected its application where an employer refused to reinstate an employee's seniority upon rehire, reasoning that the latter was a facially neutral act directly resulting from the time-barred discriminatory discharge.

The continuing violation concept was further limited in *Lorance vs. AT&T Technologies, Inc.*, ___ U.S. ___, 109 S.Ct. 2261 (1989). There, an employer had made an allegedly discriminatory change in its seniority policy. This Court held that the date the policy was implemented for all employees, rather than the date it was applied to specific employees, determined commencement of the limitations period; since the adoption of the policy on a

group basis was a discrete act of discrimination while its individual application was facially neutral, and thereby not continuing.

This case goes one step beyond *Lorance*; it collides with this Court's decision in *Havens Realty Corp. vs. Coleman*, 455 US 363 (1982); and, if approved, its rationale would extinguish the concept of "continuing violation" in the context of forced retirement under early retirement/termination incentive programs, contrary to Congress' intent to *broaden*, rather than narrow, the scope of protection afforded to workers under such programs through Title II of the Older Workers Protection Act, and contrary to the broad remedial purposes of the ADEA.

In *Coleman*, this Court found a continuing violation of the Fair Housing Act where four of the five acts alleged to constitute a continuing violation designed to deprive blacks of its benefits were time-barred, and the last act did not involve the co-plaintiffs. In so doing, the Court relied on the "broad remedial intent of Congress embodied in the Act" (455 US at 380) as authority for providing liberal application of the limitations period in a "continuing violation" setting while rejecting as "wooden" the argument that each violation was separate and stood on its own. (*Id.*)

Here, by failing to consider AMOCO's pattern of conduct with regard to other employees under the WFRP and the relationship of that pattern to ROY who was made its victim in 1987, the lower courts have implicitly denied the viability of "continuing" violations under the ADEA: this even though AMOCO's discriminatory program was designed to be applied – and was applied – on

an individual basis, as opposed to a group basis (as in *Lorance*); and even though ROY's coerced acceptance of the WFRP was the final act through which his termination – and others – by way of retirement was secured.

The judgments below thus extend the existing law as stated in *Evans* and *Lorance* to retirement incentive programs whose participants are identified only when they are selected and their terms imposed. This extension is contrary to the existing law as stated in *Coleman*, because discrete otherwise – discriminatory acts toward ROY and others are characterized as "neutral." And, by necessary implication and contrary to Congress' broad remedial intent embodied in the ADEA,[9] the lower courts have declared that an employer's coerced imposition of an early retirement/termination incentive program upon a series of employees on the basis of age does not constitute a continuing violation of the ADEA, rendering the concept meaningless.

This presents a question of self-evident importance which begs for answer by this Court.

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[9] The intent of the ADEA is expressed in 29 USC §621, reproduced at 65a.

CONCLUSION

For the foregoing reasons, petitioner respectfully suggests that this Court should grant this petition and issue a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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A. Judgment of the Court of Appeals (January 28, 1991)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5456

D. C. Docket No. 89-6220-CIV-JCP

JOSE L. ROY,

Plaintiff-Appellant,

versus

AMOCO OIL COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(January 28, 1991)

Before TJOFLAT, Chief Judge, EDMONDSON, Circuit Judge, and DYER, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.

B. Order Denying Petition for Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5456

JOSE L. ROY,

Plaintiff-Appellant,

versus

AMOCO OIL COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion January 28, 1991, 11th Cir., 1991, ___ F.2d ___).

(Filed April 3, 1991)

Before TJOFLAT, Chief Judge, EDMONDSON, Circuit Judge, and DYER, Senior Circuit Judge.

PER CURIAM:

(✔) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
UNITED STATES CIRCUIT JUDGE

C. Order of the District Court (April 18, 1990)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-6220-CIV-PAINE

JOSE L. ROY,

Plaintiff,

vs.

AMOCO OIL COMPANY,

Defendant.

_____/

ORDER GRANTING SUMMARY JUDGMENT

(Filed April 18, 1990)

This matter comes before the court upon the Defendant's Motion for Summary Judgment.

STANDARD OF REVIEW ON SUMMARY JUDGMENT

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the burden of demonstrating that there is no genuine dispute as to any material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *American Viking Contractors, Inc. v. Scribner Equipment Co.*, 745 F.2d 1365, 1369 (11th Cir. 1984).

Once the moving party has sufficiently supported the motion, the party opposing summary judgment must

come forward with significant probative evidence demonstrating the existence of a triable issue of fact. *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 114 (5th Cir. 1978). Regarding the opposing party's shifted burden, the *Anderson* Court said:

> [A] party opposing a properly submitted motion for summary judgment may not rest upon mere allegation or denials of his pleadings but must set forth specific facts showing that there is a genuine issue for trial.

Anderson at 256.

The question for the court is "not whether there is literally no evidence, but whether there is any evidence upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Anderson* at 265 (quoting *Improvement Co. v. Munson*, 14 Wall 442, 448 (1872) [emphasis in original].

The court may enter summary judgment against the non-moving party if he fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986). Failure to establish an essential element necessarily renders all other facts immaterial, leading to the conclusion that there is no genuine issue of material fact." *Id.* The moving party is then entitled to judgment as a matter of law because the opposing party has failed to establish an essential element with respect to which he or she has the burden of proof. *Id.*

Finally, all evidence and reasonable factual inferences drawn therefrom must be viewed against the party seeking summary judgment. *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1176 (11th Cir. 1985).

FACTUAL BACKGROUND

The Plaintiff alleges in this action that his employment was terminated in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*

Jose Roy began working for Amoco Oil Company on July 15, 1955. He was continuously employed by Amoco from July 15, 1955 until January 1, 1988. In 1965, Roy was promoted to a managerial position with Amoco. During the course of his managerial career with Amoco, Roy's title was given various names, including Sales Representative, Marketing Representative, and Territory Manager. However, despite these title changes, his job duties remained essentially the same since 1972.

Under the title of Territory manager, Roy was responsible for acting as a liaison between Amoco and the retail petroleum dealers who operated within his assigned territory. His job was to respond to complaints from the retail dealers and to make sure that Amoco's products were marketed and sold by the retail dealers in accordance with the company's policies.

In September, 1985, Roy had quadruple by-pass heart surgery. Roy was unable to return to work until mid-November, 1985; he admits that his job performance was affected by the surgery for at least four months. Through his deposition, Roy indicated that, after his surgery, he

tired faster and was "taking it easier." *See, Roy Deposition* at 24. As a result of his medical problems, Roy indicated that there was a lack of supervision of the retail dealers in his area and, "things were kind of getting out of control." *See Id.* at 25.

In December, 1985, at a social function following a district sales meeting, Roy requested information about early retirement eligibility and benefits from Kent Carson, Amoco's Manager of Human Resources for East Zone Marketing.

In early June, 1986, Charles Fuqua, Field Sales Manager and Roy's immediate supervisor, met with Roy and criticized several areas of his work. Specifically, Fuqua was expressed concern about Roy's possible drinking when driving a company car, his personality conflicts with three retail dealers in his territory, and Roy's failure to attend to certain administrative tasks.

In late June, 1986, in response to Roy's request, Kent Carson called Roy with the figures on his retirement. Based upon the information provided to him by Carson, Roy told him that he could not afford to retire. Roy felt that Carson was pressuring him during the telephone conversation. Carson made a second call to Roy regarding early retirement. During that call, Carson indicated to Roy that he wanted to set up a meeting to discuss the possibility of early retirement. Despite Roy's insistence that he did not want to retire, Carson said he would fly down to meet with him. Roy asked Carson "Why do you want to get rid of me?" Carson replied, "I need the room." Roy admits that to him this meant he would be replaced. *Roy Deposition* at 45.

On August 25, 1986, Roy and Carson met as previously scheduled. At the meeting, which lasted several hours, Carson presented a severance pay and retirement benefit package to Roy. Roy portrays the meeting as an adversarial one in which Carson pursued Roy "persistently throughout the night" to retire and Roy remained "adamant about not retiring." *Roy Deposition* at 121.

When Carson's efforts to convince Roy to retire proved unsuccessful, he summoned Charles Fuqua, Roy's supervisor, to join the meeting. Fuqua presented Roy with a letter signed by Fuqua criticizing Roy's job performance. Roy inquired as to the meaning of the letter; he was told that the letter was a probationary notice. At that point Roy said to Carson, "I guess if I don't retire, I'll be fired." Carson said "yes." *Roy Deposition* at 47. Roy testified that he was pretty upset by the events at the meeting. Additionally, he said that the actions of Carson and Fuqua during the meeting further convinced him that he was being victimized by age discrimination. *Roy Deposition* at 49-50. In fact, according to Roy's deposition testimony, this meeting was "the strongest indication" of Amoco's alleged age bias toward him. *Roy Deposition* at 120-121.

Shortly after this meeting, Roy's second-level supervisor, T.R. Weaver, telephoned Roy and advised him that Amoco was sending him an "acceptance of retirement" letter; if he desired to retire, the letter had to be signed and returned to Amoco within 24 hours. Roy signed the letter because, as he said in his deposition, "I turned down retirement. But I couldn't turn down forced retirement." *Roy Deposition* at 55. According to Roy, at that time, he felt he had no alternative. *Id.*

On *September 24, 1986,* Roy signed the letter and returned it to Amoco. The effect of signing the letter was that Roy requested early retirement effective January 1, 1988. Specifically, the "acceptance of retirement" letter said:

> I, Jose Roy, agree to continue employment with Amoco Oil Company, assisting on the EPICS implementation in the State of Florida. I also request and agree to severance/retirement effective January 1, 1988.

Additionally, the letter stated that:

> *Upon acceptance of this letter, severance/retirement is granted* effective January 1, 1988. the severance/retirement benefits in effect January 1, 1988, will apply.

See Defendant's Motion for Summary Judgment, Exhibit B [emphasis added].

In anticipation of his early retirement, Roy was transferred in late September, 1986 from the position of Territory Manager to a position in which he was responsible for training Amoco's retail dealers in the use of a new electronic sales processing system. He remained in the new position until the termination of his regular employment with Amoco.

Seven months after Roy signed the letter requesting early retirement, in April, 1987, he received a "work force reduction program" letter. That letter explained that in order to receive severance incentive benefits under the program, employees were required to release all claims against Amoco. Roy testified in his deposition that at that time it was "obvious" to him that the severance incentive

program was part of an overall attempt by Amoco to reduce the company's age profile. *Roy Deposition* at 76.

Thereafter, Roy received further information from Carson about the program. Roy testified that he understood that if he elected to participate in the program, he would receive severance payments equivalent to 70 weeks salary based on his 32 years of credited service with Amoco. He also understood that in return for his severance benefits, he would be required to give up his right to sue Amoco. *Roy Deposition* at 78. Subsequently, Roy and Carson engaged in an adversarial battle over Roy's signing the "employee termination agreement." At one point during this meeting, Roy told Carson that he could go to the EEOC about this program. Carson agreed that, in fact, he could do that.

In the interim, another Amoco official offered Roy a temporary arrangement whereby Roy would work for Amoco as an independent consultant beginning on January 1, 1988. Roy would work without benefits, at an hourly wage, doing the same job he was doing as ESP Coordinator through October, 1988. *Roy Deposition*, at 97-98.

It is significant that, although Roy had not yet signed the "employee termination agreement," there is not indication in the record that Amoco had changed its course regarding the retirement situation. The court finds that the extended employment as a consultant would commence after Roy's scheduled retirement. In fact, pursuant to the letter he signed on September, 1986 Roy was still scheduled to formally retire on Januray 1, 1988.

On *October 27, 1987*, Roy and Carson had another meeting. At that time, Carson told Roy that Amoco's agreement to hire him as a consultant was contingent upon his acceptance of the Work Force Reduction Program. *Roy Deposition* at 103. On that same day, Roy signed the "Employee Termination Agreement"

Following his formal retirement, on January 1, 1988, Roy received severance payments totalling $71,207.00. He has not tendered any of these monies back to Amoco. Thereafter, form January 1, 1988 until October 1, 1988, Roy worked for Amoco as an independent consultant.

Roy filed his administrative charge of age discrimination with the EEOC on August 1, 1988. At his deposition, Roy testified that he waited deliberately until that date to file the charge because he was fearful that Amoco might terminate its independent consulting agreement with him. *Roy Deposition* at 106.

PROCEDURAL BACKGROUND

Defendant Amoco has moved for summary judgment suggesting that there is no genuine issue of fact as to the following three separate grounds:

(1) That Roy's charge of age discrimination filed with the Equal Employment Opportunities Commission (EEOC) on August 1, 1988 was untimely.

(2) That Roy executed an enforceable release of all legal claims against Amoco, including those alleging age discrimination.

(3) that Roy has not rescinded the release by tendering back to Amoco the severance payments that he received in exchange for executing the release.

The court finds that Amoco has not argued that it is entitled to summary judgment on the merits of Roy's claim. Accordingly, the court need not employ the traditional burdens and standard of review for an age discrimination case. Rather, the court's analysis shall be limited to the only issues to which the Defendant has moved for summary judgment.

Having determined that the first ground, the timeliness of the EEOC charge, is dispositive of the motion for summary judgment, the court will address it first.

ANALYSIS OF THE TIMELINESS OF THE EEOC CHARGE

The court finds that the Defendant, the party seeking summary judgment has successfully borne the burden of demonstrating that there is no genuine dispute as to any material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *American Viking Contractors, Inc. v. Scribner Equipment Co.*, 745 F.2d 1365, 1369 (11th Cir. 1984).

The Defendant having sufficiently supported the motion, the burden then shifts to the Plaintiff, the party opposing the motion to come forward with significant probative evidence demonstrating the existence of a triable issue of fact. *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 114 (5th Cir. 1978). In the present case, when the burden shifted to the Plaintiff, he admitted in his brief in opposition to the motion that he "concedes that the facts

set forth in Amoco's brief in support of its Motion for Summary Judgment are generally accurate, but contends that in some respects . . . are set forth in a misleading fashion." Accordingly, the court has reviewed the record and determined that no genuine issue of material fact exists as to these issues.

However, the moving party is also required to show that he is entitled to judgment as a *matter of law. See* Fed. R. Civ. P. 56(c).

Having determined that the record supports the existence of generally undisputed facts as outlined above, the court's task is to apply the law to these facts to determine the timeliness of the Plaintiff's claim with the EEOC. *See American Hotel Management Associates Inc. v. Jones,* 768 F.2d 562, 568 (4th Cir. 1985) (limitations issue should be resolved as a matter of law if underlying facts are undisputed.)

The parties agree that Section 7(d)(2) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. § 626(d)(1) provides that in a deferral state such as Florida, an administrative charge must be filed within 300 days after the "alleged unlawful practice occurred." In fact, such filing is a prerequisite to filing a civil action under the ADEA. *McClimton v. Alabama By-Products Corp.,* 743 F.2d 1483 (11th Cir. 1984), *citing Coke v. General Adjustment Bureau,* 640 F.2d 584 (5th Cir. 1981).

The Plaintiff contends that under the facts of this case, the Defendant is not entitled to summary judgment on this issue for three reasons. First, the Plaintiff contends that the Defendant waived his right to assert the statute of limitations defense in this case as it was not

affirmatively raised in the original answer. Second, the Plaintiff contends that the alleged violation of the ADEA occurred on October 27, 1987 and, therefore, the EEOC charge was filed in a timely manner. Finally, the Plaintiff argues that Amoco's alleged ADEA violation is continuing in nature.

1. Did Amoco's Failure to Raise the Defense in its Answer Constitute Waiver of the Defense?

In *Herman v. National Broadcasting Company, Inc.*, 569 F. Supp 282 *aff'd in part, reversed in part on other grounds*, 744 F.2d 604, *cert denied*, 105 S.Ct. 1393 (1984), the court was called upon to determine if defendants in an age discrimination case waived their rights to raise the statute of limitations by allegedly failing to raise or preserve the defense by answer or otherwise. *Herman*, 569 F.Supp. at 287. The court determined that since the Defendant's answer denied that Plaintiffs complied with all procedural prerequisites and that this same denial was restated as an affirmative defense, that the "plaintiffs were properly appraised of [the defendant's] concerns for the jurisdictional basis of the suit. *Id* at 287.

In the present case, Paragraph 8 of the Plaintiff's Complaint states that "Roy has performed all conditions precedent to bringing this action." At Paragraph 8 of the Defendant's Answer, it states that "[i]n response to Paragraph 8 of the complaint, Defendant denies the allegations therein. Additionally, like in the *Herman* case, the plaintiffs were properly appraised of the defendant's concern for the jurisdictional basis of the suit as Defendant Amoco raised as an affirmative defense that this court lacks jurisdiction of Plaintiff's complaint.

Additionally, it has been held that a statute of limitations defense may be raised for the first time in a motion for summary judgment, absent a showing of prejudice by the Plaintiff. *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir. 1984). In the instant case, the Plaintiff has made no showing of any kind of prejudice beyond that permitted under the law.

The court is satisfied that the Defendant, through its answer, sufficiently raised the issue of the Plaintiff's failure to meet the prerequisites to suit in this court. Accordingly, the court finds that the Defendant did not waive his right to raise the statute of limitations as an affirmative defense.

2. On What Date Did the "alleged unlawful practice occur" for the Purposes of the ADEA Statute of Limitations?

In the Supreme Court case of *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the Court concluded that the limitations period commenced no later than when the college announced its official position on tenure, not when the employment contract expired.

The Eleventh Circuit discussed *Ricks* in *Calhoun v. Federal National Mortgage Association*, 823 F.2d 451 (11th Cir.) *cert denied* 484 U.S. 1078 (1988). In that case, the court addressed the issue of when the statute of limitations period under the ADEA began to run. The court determined that the issue of timeliness turned on when the period for filing began. Quoting *Chardon v. Fernandez*, 454 U.S. 6 (1981), the Eleventh Circuit determined that

> The proper focus for purposes of establishing the time at which the limitations period begins

> to run 'is on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful.'

Calhoun at 455, *quoting Chardon* at 8 [emphasis in original]. The court went on to hold that the alleged illegal acts were the employer's decision to terminate and the notice of that decision to the Plaintiff. *Id.* at 456.

In the present case, the court finds that after the Plaintiff's initial meeting with Carson and Fuqua he had at least constructive knowledge that he could either accept early retirement or be fired.[1] Additionally, on September 24, 1986, when Roy signed the request for early retirement, allegedly against his will, he certainly had unequivocal notice of Amoco's intention to terminate his employment on January 1, 1988. Accordingly, under the above-stated authority, the court finds that the date for calculating the commencement of the statute of limitations period of the ADEA is September 24, 1986. Once Roy executed the severance/retirement statement accepting Amoco's offer, the termination of his employment through retirement was "a delayed, but inevitable consequence." *See Calhoun* at 456. *Ricks*, 101 S. Ct. at 504.

As noted above, the Plaintiff filed the EEOC charge on August 1, 1988, almost two years after the date upon which the court has determined the "alleged unlawful practice occurred." Therefore, pursuant to 29 U.S.C. § 626(d)(1), the Plaintiff's EEOC charge was not timely

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[1] In fact, the Plaintiff has testified that he had actual knowledge of this fact. However, viewing the facts in the light most favorable to the Plaintiff, the court will assume only constructive knowledge at this point.

filed. Accordingly, the Plaintiff's present action case is time barred.

3. Is the Alleged Violation a Continuing Violation Under the ADEA?

Again the Supreme Court offers guidance on the resolution of this final issue. In *United Airlines, Inc. v. Evans*, 97 S. Ct. 1885 (1977), the Court held that a continuing violation cannot be established merely by allegations that the plaintiff continues to suffer from the ongoing effects of some past act of discrimination. Rather, the court held that "the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists." *Id* at 1889. *See also Ricks, supra.*

The Eleventh Circuit was called upon to review the timeliness of an EEOC claim which was alleged to be continuing in nature in *Burnam v. Amoco Container Co.*, 755 F.2d 893 (11th Cir. 1985). The court determined that

> a failure to rehire subsequent to an allegedly discriminatory firing, absent a new and discrete act of discrimination in the refusal to rehire itself, cannot resurrect the old discriminatory act. Otherwise, a potential plaintiff could always circumvent the limitations by reapplying for employment. A simple request for reinstatement "seeks to redress the original termination.

Id at 894. The court finds that Roy's containing requests to continue in employ with Amoco failed to reactivate the alleged discriminatory act for the purposes of the statute of limitations. Accordingly, the alleged violation was not continuing in nature.

In view of the foregoing, the court finds that there are no factual issues in dispute and that the Defendant must prevail as a matter of law. Therefore, it is

ORDERED and ADJUDGED that the Motion for Summary Judgment is hereby GRANTED. The clerk of the court is instructed to enter final judgment against the Plaintiff and in favor of the Defendant. Further, it is

ORDERED and ADJUDGED that the court does not find sufficient cause to award attorneys fees in this case and each party shall, therefore, bear its own fees and costs.

DONE and ORDERED at West Palm Beach, Florida, this 18th day of April, 1990.

/s/ James L. Paine
UNITED STATES
DISTRICT JUDGE

cc:
Charles Burr, Esq.
Thomas Pilacek, Esq.

D. Petitioner's Complaint in District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

CASE NO. 89-6220-CIV-PAINE

JOSE L. ROY,

Plaintiff,

vs.

AMOCO OIL COMPANY,

Defendant.

_____/

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff sues Defendant and alleges:

1. This is an action for damages brought pursuant to the Age Discrimination in Employment Act [ADEA], 29 USC §621 *et seq.*

2. The Court has jurisdiction of this action pursuant to 28 USC §1331 and 29 USC §626(c).

3. Plaintiff JOSE L. ROY [ROY] is an adult individual residing at Orlando, Orange County, Florida and is a "person" entitled to bring an action pursuant to the ADEA.

4. Defendant AMOCO OIL COMPANY [AMOCO] is a corporation duly organized and existing pursuant to the laws of the State of Maryland, and is authorized to do business, and is doing business, within the State of Florida, and within the geographic jurisdiction of this Court.

5. The conduct and the injury complained of herein occurred at Ft. Lauderdale, Broward County, Florida within this judicial district and division.

6. At all times material AMOCO was and is an employer within the meaning of §11(b) of the ADEA, 29 USC §630(b).

7. At the time of the conduct complained of herein, ROY's age placed him within the category of individuals protected by §12(a) of the ADEA, 29 USC §631(A).

8. ROY has performed all conditions precedent to bringing this action.

9. ROY had been employed by AMOCO in various positions for a period of in excess of 32 years at the time of his involuntary retirement and termination complained of herein which occurred October 1, 1988. Prior to January 1, 1988 Roy held the position of Territory Manager. Effective January 1, 1988 ROY was forced to participate in a "workforce reduction program" which consisted of his removal from the position of Territory Manager into the position of "ESP Consultant" from January 1, 1988 through October 1, 1988, at which time his employment was terminated and he was forced to accept involuntary retirement and other benefits in accordance with the "workforce reduction program" as more fully amplified herein. At the time of his involuntary retirement ROY was age 56, having been born March 22, 1932.

10. At all times ROY was qualified to hold the positions which he held at the times of the conduct complained of herein, as well as other positions within the

company which were available to be filled at the times of the conduct complained of herein.

11. Despite the fact that ROY was eminently qualified and capable of performing the duties of his position as well as other available positions within AMOCO, nevertheless AMOCO consciously refused to consider retaining ROY because of his age, and/or AMOCO regarded ROY's age as a negative factor in determining whom to select for its force reduction, as more fully set forth below.

12. As the result of AMOCO's conduct complained of herein, ROY was adversely affected by AMOCO's decision in that he was initially transferred to another position which AMOCO knew was temporary in nature; and he was thereafter constructively discharged by AMOCO on or about October 1, 1988 by being forced to accept involuntary retirement.

13. The reason for selection of ROY for involuntary retirement pursuant to the employer's "workforce reduction program" was due to ROY's age, in violation of the ADEA. AMOCO's unlawful conduct was accomplished in the following fashion:

(a) At a distant meeting which was held in December, 1985, ROY inquired about the "three-three-one" program which was being offered by AMOCO as an inducement for older employees to accept early retirement. This program involved adding three years to an employee's age for retirement credit purposes; adding three years to the employee's years of service with AMOCO; and adding one year to the employee's severance pay.

(b) In April, 1986 ROY advised Kent Carson, Human Relations Manager, that he was not interested in retiring and was not willing to accept the "three-three-one" program. This advice was further confirmed in a telephone conversation subsequent to ROY's meeting with Carson.

(c) Approximately August, 1986, Carson met ROY at a hotel in Maitland, Florida and badgered ROY for almost 2 hours in order to induce ROY to accept retirement. ROY refused to accept.

(d) When ROY refused to retire Charles Fuqua, Field Sales Manager and ROY's supervisor, produced a letter which had been previously typed which abruptly placed ROY on "probation" after 32 years of continuous service with AMOCO. In fact, the alleged conduct set forth in the letter was false and pretextual, and was in retaliation for ROY's refusal to voluntarily retire. Fuqua had been previously instructed to write the letter to ROY for that reason; and he privately acknowledged to ROY that ROY was an excellent employee.

(e) In approximately September, 1986 ROY was notified that his superiors were sending him an "acceptance of retirement" letter, which had to be signed and transmitted to ROY's superiors within 24 hours. ROY refused to sign the letter.

(f) Five months later, in February, 1987, AMOCO commenced a series of moves against employees within the protected category, including ROY, which were designed to either induce them to accept retirement or, alternatively, to find an excuse to make it

appear that they would be discharged for cause or, alternatively, to eliminate their positions due to an unnecessary reduction in force.

(g) In pursuance of that design, a District Analyst, William Quast, was given a lateral transfer to the position of Territory Manager. Quast at that time was approximately the same age as ROY and enjoyed the same length of service with AMOCO. As the result of the lateral transfer, Quast was physically transferred to Texas. Approximately two months later, AMOCO eliminated a separate marketing effort in Louisiana and Texas, which in turn resulted in the elimination of Quast's job. Quast was thereafter either terminated involuntarily or forced to accept involuntary retirement.

(h) In the same month, Joseph Pelt, a Territory Manager in Tampa, who was at that time approximately the same age as ROY and enjoyed approximately the same length of service with AMOCO, was told by his superiors that they "needed" his territory. Pelt was offered a "Maintenance Supervisor" job, which entailed a substantial demotion and concomitant reduction in pay and benefits. At that time Pelt accused his District Manager, James Robbins, of taking that action due to Pelt's age, to which Robbins responded "that's right".

(i) At the same time Pelt was notified of his demotion Charles Fuqua, ROY's superior, was advised he was being demoted. The only reason provided to Fuqua for the demotion was that it was a "subjective decision". At that time Fuqua was approximately the same age as ROY, but had less years of service with AMOCO than did ROY.

(j) On October 27, 1987 ROY was forced to sign a document by which he agreed to the terms of the "workforce reduction program" being implemented by AMOCO. Under the terms of the program, ROY was forced to agree that his position as Territory Manager was being eliminated effective January 1, 1988; and that ROY would be retained by AMOCO as a "consultant" and would continue to receive his salary and benefits until October 1, 1988. The alternative to ROY's agreement to the "workforce reduction program" was elimination of his position; no severance pay; and termination from employment.

(k) Effective October 1, 1988 ROY was terminated from AMOCO and was forced to receive only the benefits available under the "workforce reduction program" on an involuntary basis. No alternative position was offered to ROY, although ROY was fully qualified and capable of performing duties of available jobs.

(l) In spite of the company's claim that it was necessary to eliminate ROY's position due to a reduction in force, nevertheless AMOCO continued to hire Territory Managers subsequent to ROY's termination, and continues to do so to this date. All of the new hires are outside the protected age category or are substantially younger than ROY.

14. The "workforce reduction program" to which ROY was forced to agree in order to maintain a position with AMOCO until October 1, 1988 and to obtain substantial monetary benefits subsequent to termination of his employment was, in fact, a subterfuge to evade the purposes and requirements of the ADEA. AMOCO has

publicly made a statement that AMOCO was lowering its "age profile", particularly in the marketing and general sales area formerly occupied by ROY.

15. The reason why ROY was deprived of his position as Territory Manager, was thereafter forced to enter into the workforce reduction program, and was thereafter placed in a position which the employer knew was temporary in nature, and was thereafter terminated, was ROY's age, in violation of §4(a) of the ADEA, 29 USC §623(a) and (d).

16. At all times AMOCO, together with its authorized agents, was aware of the requirements of the Age Discrimination in Employment Act. Nevertheless, AMOCO, through its authorized agents, knowingly and willfully engaged in the above conduct in violation of ROY's rights, and attempted to disguise such violations by purporting to cloak them with legitimate reasons, in violation of §4(a) of the ADEA, 29 USC §623(a). ROY is therefore entitled to liquidated damages pursuant to 29 USC §626(b).

17. ROY is entitled to attorney's fees for bringing this action, pursuant to 42 USC §1988 and 29 USC §216(b).

18. ROY demands trial by jury on all issues triable as of right by a jury.

WHEREFORE, ROY demands:

(a) That he be awarded full back pay to the time of his termination of employment, together with interest thereon;

(b) That he be awarded compensatory damages consisting of extraordinary expenses incurred in attempting to secure his statutory rights; to make up for lost pay and benefits; and attempting to secure other employment; together with damages for severe mental anguish and distress, loss of reputation and loss of his career;

(c) That he be awarded liquidated damages for AMOCO's willful violation of the ADEA;

(d) That he be reinstated to employment without interruption in seniority and benefits, or alternatively that he be awarded front pay in lieu of reinstatement; and

(e) That he be awarded attorney's fees and costs of this action together with such other relief as may be appropriate.

DATED this 17th day of March, 1989.

PILACEK & COHEN
2101 W. State Road 434
Suite 105
Longwood, FL 32779
(407) 774-9500

BY: /s/ Thomas J. Pilacek
Thomas J. Pilacek

Fla. Bar No. 143576

E. Pretrial Stipulation

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

CASE NO. 89-6220-CIV-PAINE

JOSE L. ROY,

Plaintiff,

vs.

AMOCO OIL COMPANY,

Defendant.

_____/

JOINT PRE-TRIAL STIPULATION

The parties, pursuant to prior order of the Court and Local Rule 14, file with the Court their Joint Pre-Trial Stipulation.

1. **Nature of the Action:**

This is a complaint for damages and equitable relief brought pursuant to the Age Discrimination in Employment Act which claims that Plaintiff JOSE L. ROY was forced to retire from his position with AMOCO OIL COMPANY on the basis of his age. ROY seeks compensatory damages including lost wages and benefits to date of trial; extraordinary expenses incurred as the result of his loss of employment; damages for mental anguish; and future lost wages, together with liquidated damages and attorney's fees. Alternatively, ROY seeks equitable relief consisting of back pay; reinstatement to employment, or

front pay in lieu of reinstatement; together with liquidated damages and attorney's fees. This is a jury trial.

2. **Basis of Federal Jurisdictions:**

The basis of this Court's jurisdiction is the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq.

3. **Pleadings Raising the Issues:**

1. Complaint
2. Answer and Affirmative Defenses
3. Reply to Affirmative Defenses
4. Motion for Summary Judgment

4. **Pending Motions or Other Matters Requiring Action By the Court:**

(a) AMOCO's Motion to Strike Claim for Punitive and Compensatory Damages;

(b) AMOCO's Motion for Summary Judgment;

(c) AMOCO's Motion for Separate Trial;

(d) AMOCO's Motion in Limine (to be filed); and

(e) ROY's Motion to Permit Filing a Response to Reply Brief

5. **Stipulated Facts Which Will Require No Proof at Trial:**

(a) Plaintiff JOSE L. ROY is an adult individual residing at Orlando, Orange County, Florida and is a "person" entitled to bring an action pursuant to the ADEA.

(b) Defendant AMOCO OIL COMPANY is a corporation duly organized and existing pursuant to the laws of the state of Maryland, and is authorized to do business, and in doing business, within the State of Florida and within the geographic jurisdiction of this Court.

(c) The conduct complained of occurred within this judicial district and division.

(d) AMOCO is an employer within the meaning of the ADEA.

(e) ROY was employed by AMOCO from July 15, 1955 through and including January 1, 1988.

(f) At the time of ROY's separation from employment on October 1, 1988, ROY was 56 years of age, having been born March 22, 1932.

(g) On September 24, 1986 ROY signed a letter which requested and agreed to severance/retirement effective January 1, 1988. The circumstances surrounding execution of this letter are disputed.

(h) On October 27, 1987, ROY signed a document entitled "The 1987 AMOCO Work Force Reduction Program". The circumstances surrounding execution of this document are disputed.

(i) ROY received $71,201.50 as severance pay. ROY has not tendered this amount to AMOCO as of this date.

(j) ROY was engaged as a contractor for AMOCO during the period January 1, 1988 through September 30, 1988.

(k) ROY's separation from employment was not based upon unsatisfactory job performance.

(l) At all times ROY was qualified to hold the positions of Senior Territory Manager and ESP Coordinator.

6. **Issues of Fact to be Litigated at Trial:**

(a) Whether ROY's retirement effective January 1, 1988 was voluntary or involuntary.

(b) Whether ROY advised representatives of AMOCO prior to September 24, 1986, that he did not wish to retire. (AMOCO does not agree with this formulation of the issue).

(c) Whether ROY advised representatives of AMOCO that between September 24, 1986 and October 27, 1987, he did not wish to retire. (AMOCO does not agree with this formulation of the issue).

(d) Whether ROY's execution of the letter dated September 24, 1986 was voluntary or involuntary.

(e) Whether ROY's execution of the "1987 AMOCO Work Force Reduction Program" document on October 27, 1987 was voluntary or involuntary.

(f) Whether AMOCO engaged in a common scheme or design intended to force the retirement of marketing employees in AMOCO's East Zone.

(g) If liability is established, whether AMOCO's violation was willful.

(h) Whether the circumstances under which ROY retired effective January 1, 1988 were part of an overall scheme and design by AMOCO to eliminate older employees.

7. **Issues of Law on Which There is Agreement:**

(a) The Court has jurisdiction of this action pursuant to 29 U.S.C. §621 et seq.

(b) Forced retirement of an employee in ROY's position would constitute a violation of the ADEA.

(c) ROY's separation from employment effective September 1, 1988 was not the result of a reduction in AMOCO's work force.

(d) In the event ROY prevails, he is entitled to an award of attorney's fees pursuant to 29 U.S.C. §216(b).

8(A). **Issues of Law Which Remain for Determination by the Court:**

(a) Whether ROY's charge of age discrimination filed with the Equal Employment Opportunities Commission on August 1, 1988 was timely filed.

(b) Whether ROY's execution of the "1987 AMOCO Work Force Reduction Program" document on October

27, 1987 constitutes an enforceable waiver of ROY's right under the ADEA.

(c) If liability is established, whether ROY is entitled to recover: (1) lost wages to date of trial; (2) extraordinary expenses occurred as the result of ROY's loss of employment; (3) compensatory damages for mental anguish; (4) future lost wages; (5) liquidated damages; (6) punitive damages; (7) reinstatement or front pay in lieu of reinstatement.

8(B). **Issues of Law Proposed by AMOCO to Which ROY Objects:**

(a) Whether ROY's failure to tender back severance payments precludes ROY's attempt to avoid the operation of the waiver executed by ROY on October 27, 1987. (ROY would state the issue as: Whether ROY is required to tender back severance payments as a prerequisite to maintenance of his claim).

(b) Whether ROY's decision to retire was voluntary or involuntary (ROY contends that this is an issue of fact for determination by the jury).

(c) Whether ROY effectively revoked his agreement to retire as expressed in the document in which he executed September 24, 1986 (ROY contends that this is an issue of fact for determination by the jury).

(d) Whether the circumstances which concern the employment of Quast, Pelt and Fuqua are relevant to ROY's claim (ROY contends that the issue is properly stated as whether the circumstances surrounding the

employment of Quast, Pelt and Fuqua are admissible to prove pretext and willful violation of the ADEA).

8(C). **Issues of Law Proposed by ROY:**

(a) Whether private, unsupervised ADEA waivers are enforceable as a matter of law.

(b) Whether the 1987 Work Force Reduction Program is a subterfuge to evade the purposes and policies of the ADEA.

(c) If unsupervised ADEA waivers are enforceable in the abstract, whether the appropriate test to determine enforceability is "knowing and voluntary" or "totality of the circumstances" or some other test.

(d) Whether economic coercion is sufficient to avoid enforcement of a private, unsupervised ADEA waiver.

9. **Plaintiff's Exhibits to be Offered at Trial, Other Than Impeachment Exhibits:**

1. (Composite) Salary and benefit records for ROY, January 1, 1986 to September 30, 1988.
2. Letter Carson to ROY, duted September 11, 1986.
3. Job description "Territory Manager".
4. AMOCO Policies and Procedures Manual.
5. 1987 AMOCO Work Force Reduction Program-ROY.
6. 1987 AMOCO Work Force Reduction Program-Pelt.
7. 1987 AMOCO Work Force Reduction Program-Quast.

8. (Composite) Evaluations of ROY, 1984-Present.

9. AMOCO Pension Plan effective January 1, 1988.

10. EEOC Charge, August 1, 1988.

11. AMOCO's letter to EEOC in response to charge, with cover letter to Robbins.

12. List of positions within Ft. Lauderdale District January 8, 1988.

13(a). Handwritten letter Carson, Pelt (undated) (PX15-Carson deposition).

13(b). Typed letter Carson to Pelt, June 10, 1988.

14. AMOCO Corporation 1988 Annual Report.

15. Letter, DeBeers to Field Sales Managers June 18, 1987.

16. Letter, Robbins to ROY October 23, 1987.

17. Letter, Glasgow to ROY November 26, 1986.

18. Letter, November 21, 1986, Robbins to McMullin with cover memo.

19. Letter, Pelt to Carson May 6, 1988.

20. Letter of intent, Pelt December 23, 1987.

21. Carson memo to file re: Pelt May 28, 1987.

22. Carson memo to file re: Pelt June 1, 1987.

23. Correspondence Carson/Pelt May 22, 1987 (Carson deposition exhibit 23)

24. Carson memo re: Pelt October 27, 1984.

25. Organization Chart (East Zone Marketing) September 9, 1987.

26. Organization Chart (East Zone Marketing) March 1, 1988.

27(a). Draft letter, Bergman to Rauscher October 30, 1987.

27(b). Letter, Bergman to Rauscher November 2, 1987.

28. 1987 AMOCO Work Force Reduction Program documents, East Zone Employees.

29. (Composite) Work Force Reduction Program documents in use 1986-present.

30. Employee information-Juan del Cuedo.

31. Affirmative Action Statement.

32. Documents requesting retirement benefits October 27, 1987 (ROY).

33. Carson memo re: ROY, November, 1985.

34. Carson memo re: ROY, October 27, 1987.

35. (Composite) documents re ROY's "contractor" status.

36. Letter, ROY to Carson October 27, 1987.

37. Letter, Carson to ROY June 19, 1987.

38. Letter, Fuqua to ROY August 20, 1986.

39. Carson memo re ROY June 3, 1987.

40. Questions/responses, ROY/Carson @ June, 1987.

41. SPAN Magazine, 1989 Issue 4.

42. Deposition of R. Kent Carson

43. Deposition of William Quast.

44. Deposition of J.C. Bergman.

45. Deposition of Terry Weaver.

46. Deposition of Craig Glasgow.

47. Deposition of Charles Fuqua.

48. All exhibits listed by AMOCO.

49. Documents establishing names, ages and positions of Ft. Lauderdale District marketing employees January 1, 1986 to present.

50. ROY's "working file".

Both parties agree that their lists of exhibits may be amended up to and including ten days prior to trial, with notice and copies of exhibits to the other party.

10. **[Defendant's Exhibits to be Offered at Trial, Other Than Impeachment Exhibits:]**

1. Letter dated August 20, 1986 from C. Fuqua to ROY.

2. Letter dated September 11, 1986 from K. Carson to ROY.

3. Letter dated April 13, 1987 from K. Carson to ROY, with attachment.

4. Letter dated June 19, 1987 from K. Carson to ROY.

5. Letter dated October 27, 1987 from ROY to K. Carson.

6. Letter dated October 23, 1987 from J.D. Robbins to ROY.

7. Employee Termination Agreement executed by ROY on October 27, 1987.

8. Hand-written notes of K. Carson re: meeting with ROY at Sheraton Maitland.

9. Hand-written notes of K. Carson dated June 3, 1987.

10. Hand-written notes of K. Carson dated October 2, 1987.

11. Hand-written notes of K. Carson dated October 27, 1987.

12. Hand-written notes of ROY re: severance/ retirement.

13. Letter of Intent executed by ROY.

14. Miscellaneous severance/retirement documents executed by ROY.

15. Letter dated October 12, 1988 from J.D. Robbins to Tamara Flagstad.

16. Miscellaneous correspondence from Anita Brown to ROY.

17. Hand-written notes of Anita Brown dated November 16, 1987.

Both parties agree that their lists of exhibits may be amended up to and including ten days prior to trial, with notice and copies of exhibits to the other party.

11. **Plaintiff's Witnesses to be Offered at Trial, Other Than Rebuttal Witnesses:**

1. JOSE L. ROY
2. Garyon Roy
3. Frank Tibbets
4. Jose Canseco
5. Juan del Cuedo
6. William Quast
7. Charles Fuqua
8. Joseph Pelt

9. Craig Glasgow
10. J.D. Robbins (adverse)
11. Terry Weaver (adverse)
12. J.C. Bergman (adverse)
13. R. Kent Carson (adverse)
14. Eddy Barbosa
15. Joseph Rosier
16. All witnesses listed by Defendant.

The parties agree that each may amend their respective witness lists up to and including ten days before trial, with notice to the other and a description of the testimony to be provided through each additional witness.

12. **Defendant's Witnesses to be Offered at Trial, Other Than Rebuttal Witnesses:**

1. Terry Weaver
2. Kent Carson
3. Charles Fuqua (adverse)
4. Anita Brown
5. Cooper Agent
6. All witnesses listed by ROY.

The parties agree that each may amend their respective witness lists up to and including ten days before trial, with notice to the other and a description of the testimony to be provided through each additional witness.

13. **Estimated Trial Time:**

Plaintiff estimates five days; Defendant estimates three days.

14. **Estimate of Allowable Attorney's Fees:**

The parties are unable to estimate the maximum allowable attorney's fees. The parties agree that attorney's fees are to be determined pursuant to the criteria set forth in *Johnson vs. Georgia Highway Express*, ___ F.2d ___.

DATED this ___ day of April, 1990.

Law Offices of:
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By: _____
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By: _____
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Fla. Bar No. 689416

Counsel for Defendant

OF COUNSEL:

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AMOCO CORPORATION
200 E. Randolph Drive
Mail CO2104
Chicago, IL 60601

F. Affidavit of Jose L. Roy

AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF SEMINOLE)

PERSONALLY APPEARED before the undersigned JOSE L. ROY, who, being first duly sworn, deposes and says:

1. I was employed by AMOCO OIL COMPANY from July 15, 1955 to January 1, 1988. I have actual knowledge of the facts recited in this affidavit.

2. The purpose of this affidavit is to supply additional information to that which is contained in my deposition taken by counsel for AMOCO on October 10, 1989.

3. I had held the position of Territory Manager, a first level management position, from May, 1965 through January 1, 1987, when I received the District Roster listing me as ESP Coordinator at the same pay and benefit level. I was never notified of any change in job title or position. My duties as Territory Manager involved dealing directly with jobbers and retailers doing business with AMOCO. As ESP Coordinator I taught dealers to work with a new computerized sales/purchase system for AMOCO.

4. When I received a blank copy of the Work Force Reduction Program in the mail in April, 1987, I had no idea that it was coming or what it was. I skimmed the document briefly and did not like what I saw. I remember becoming angry and thinking that this is ridiculous. I then put the document away and have not looked at it except for one or two occasions since then, until I signed the document on October 27, 1987.

5. When I met with Carson at Ft. Lauderdale in June, 1987, neither of us had a copy of the document with us. Rather, the discussion was that Carson wanted me to retire and to sign the document; and I continually told Carson that I would not do it.

6. When I met with Carson on October 27, 1987 at the Tampa Airport Marriott, I did not bring my document with me. Carson had brought the original for me to sign, together with my other retirement papers. When I was presented with the Work Force Reduction Program document by Carson I had not looked at it for several months.

7. Although at all times I was aware that AMOCO could not discriminate against me because of my age, and I had mentioned that fact to Carson and others on several occasions, nevertheless I had not gone to the EEOC or to an attorney to become fully advised of my precise rights and remedies under the Age Discrimination in Employment Act. In fact, even when I filed my charge with the EEOC on August 1, 1988, I was not specifically advised of my rights and remedies. The first time I became aware of these rights and remedies was when I retained my present attorney, after I had filed the charge with the EEOC.

8. When I met with Carson in Ft. Lauderdale, and he attempted to get me to sign the Work Force Reduction Program document, I told Carson that the reason I would not sign it was because I did not want to retire, and that I wanted to continue working for AMOCO. At the conclusion of the meeting I believed, based on all that had occurred, that AMOCO was going to get rid of me no matter what it took.

9. After that meeting, I spoke with Carson on the telephone at least one time that I remember. I remember this particular conversation because Carson was strongly trying to convince me to sign the Work Force Reduction Program document, and I was equally insistent that I would not sign it. I remember telling Carson that I had told him before and was telling him now that I did not want to retire, and that I was especially offended by and did not agree to the terms of the Work Force Reduction Program.

10. In early October, 1987, I attended a Micro-Max (computer) meeting in Chicago. This was a training meeting for the purpose of implementing a new training program for dealers. During the session Cooper Agent, who was in charge of the ESP Program for AMOCO, pulled me out of the meeting and said that he wanted me to stay on with him in the ESP Program after I retired. By that time it was common knowledge throughout the company that I was "scheduled" to retire effective January 1, 1988. Agent proposed that I continue on in the position of "consultant" for AMOCO at an hourly rate but without benefits, doing the same job I had been doing as ESP Coordinator. We were able to arrive at an arrangement under which I would be a "consultant". At that time, I had virtually accepted the fact that no matter what I said the company was going to terminate me anyway effective January 1, 1988, and since I needed to work if that occurred, I was happy to have this as a fall-back for at least nine months. At no time during our negotiations did Agent advise me that I would have to sign a waiver of any rights or claims which I may have had against AMOCO in forcing my retirement.

11. Approximately one week to ten days prior to October 27, 1987, Mr. Carson's secretary called and asked me to meet with Mr. Carson at the Marriott Airport Hotel in Tampa. She did not explain the purpose for the meeting; however, I was pretty certain that Carson wanted to talk to me some more about my retiring. I am not certain how I knew that, but I remember that I had previously written a letter to Carson to hand to him at that meeting which explained my understanding of how my forced "retirement" was to come about, and under what conditions. I gave Carson the letter at the meeting, but he did not even read it.

12. During the meeting I again reminded Carson that I was not ready to retire and did not want to retire because I could not afford to. Because I had already accepted the fact that AMOCO was going to retire me anyway. I further explained that if I were being forced to retire, then I wanted it to be in accordance with the conditions and with the benefits which had been agreed to by AMOCO as the result of my September, 1986 letter. That letter did not require me to waive any rights which I may have had against AMOCO.

13. In response, Carson said that I had to sign the Work Force Reduction Program document. If I did not, not only would I not work for AMOCO beyond the end of the year; I would not be a consultant despite my agreement with Cooper Agent. Carson also said that AMOCO's policy was to no longer grant severance pay unless I signed the Work Force Reduction Program. I told Carson, "Well, I guess there is no other option left" and I signed the Work Force Reduction Program document. After I did so, Carson gave me for signature, and I signed, all of the

other documents requesting retirement benefits, including requests for medical benefits, dental benefits, COBRA benefits, election of method of severance pay; and a lump sum settlement in lieu of vested pension benefits.

14. The reason I requested my pension in a lump sum, rather than as an annuity was that if, given my history of heart disease, I were to pass away, my wife would only receive half a pension payment and, given her ill health, if she passed away from heart disease then my children would inherit nothing. This way, there would at least be an estate for my family to inherit. This whole process was extremely abhorrent to me; and I was confused and torn between telling Carson to "shove it" or doing the best I could for my family under the circumstances. Carson told me that I had to sign the documents that very day, because the company needed sixty days prior to my effective retirement date to process the paperwork.

15. I attended the deposition of Kent Carson in Chicago, Illinois on November 2 and 3, 1989 together with my attorney and a court reporter. Because we ran out of time, we will have to come back to complete his deposition. I was present at all times during questioning of Mr. Carson by my attorney. At one point on the second day, at approximately mid-morning, my attorney asked Carson what would have happened if I had not signed the Work Force Reduction Program document. Carson replied that I would have remained a Territory Manager. This was absolutely shocking, and I commented to my attorney during a break that he had never offered me that choice which, in fact he had not; and that Carson was a "lyng son-of-a-bitch." I was highly upset by Carson's testimony.

16. In my deposition a meeting between myself, Carson and Charlie Fuqua is referred to, which occurred in August, 1986. At that meeting, I was handed a letter advising me I was on "probation". After I received that letter, however, I was never further evaluated, counseled, warned, or reviewed in my job performance. The next thing that happened to me was that I received the duties of ESP Coordinator, and I thereafter received consistent praise from AMOCO officials, including Carson, in the way I was doing that job.

17. At the time I executed the Work Force Reduction Program document, it was my understanding that employees who were terminated for cause, as opposed to having their position eliminated, would have all of their fringe benefits eliminated. I base that understanding upon the fact that to my knowledge at least two employees in Pennsylvania who were fired for fiscal improprieties had lost all their fringe benefits, even though they were employees vested under the retirement program at AMOCO. I do not know whether, in fact, this was true; however, I was desperately afraid that I would lose my health insurance benefits if AMOCO found an excuse to try to fire me for cause if I resisted retirement. I was fearful that given my prior health problems, and my wife's health problems, that I would be unable to qualify for another health policy. Not only do I have a coronary problem, but in addition I am a diabetic, insulin dependent, and will require continuing medication and medical treatment for the rest of my life. It is my understanding that few, if any, insurance companies are willing to provide coverage to people with such severe pre-existing conditions.

18. At the time I signed the Work Force Reduction Program document I did not want to retire, and I had told Carson many times that I did not want to retire. At no time did he tell me I did not have to retire. Except for the sequence of events outlined in my deposition testimony and in this affidavit, if the decision were mine I would be working for AMOCO until today.

FURTHER AFFIANT SAYETH NOT!

DATED this 25th day of January, 1990.

/s/ Jose L. Roy
JOSE L. ROY

SWORN TO AND SUBSCRIBED before me
this 25th day of January, 1990.

/s/ Deborah C. Brock
NOTARY PUBLIC, STATE OF FLORIDA

My Commission Expires:

G. September 11, 1986 letter

[LOGO] Amoco Oil Company

September 11, 1986

Personal/Confidential

EXHIBIT II

Mr. Jose Roy
Fort Lauderdale District

Your request for severance/retirement has been received. As you have stated it would be effective January 1, 1988. In addition there are provisions for continued employment until that time. The following addresses the terms of employment until retirement.

Upon acceptance of this letter, severance/retirement is granted effective January 1, 1988. The severance/retirement benefits in effect on January 1, 1988, will apply. The work assignment will be to assist the Manager-Merchandising/Training (Fort Lauderdale) in the implementation and training for EPICS. This will be for the Fort Lauderdale district only and should the implementation of this program extend beyond year-end 1987, a determination will be made by the Company at that time, to see if this agreement can be extended.

During this time frame you will report to the Manager-Merchandising/Training and will be considered under the same work provisions as you currently are, i.e. results management objectives, performance evaluation, etc.

Your assistance in this project is greatly appreciated. Should you have any questions concerning the next 15 months, please ask for clarification before signing this

agreement. The district is looking forward to utilizing your skills in this extremely important assignment.

/s/ R. Kent Carson/oy
R. Kent Carson
Mail Code 1404A, General Office

RKC/ib

I, Jose Roy, agree to continue employment with Amoco Oil Company, assisting on the EPICS implementation in the State of Florida. I also request and agree to severance/retirement effective January 1, 1988.

Agreed: _____ Witness: _____

Date: _____

H. 1987 Amoco Workforce Reduction Program

THE 1987 AMOCO OIL COMPANY WORKFORCE REDUCTION PROGRAM

INTRODUCTION

Beginning on April 1, 1987, Amoco Oil Company will make a number of workforce reduction decisions. While the number of positions eliminated will be limited, the Company has elected to adopt the following 1987 Amoco Oil Company Workforce Reduction Program ("Program"). The pages that follow will acquaint you with the benefit plan options being provided in connection with any termination under the Program.

For those of you who may be affected, either by your own choice or as a result of a management decision, these benefits will be important. You are encouraged to review this brochure thoroughly and familiarize yourself with the options available under this Program. In addition, you are encouraged to secure the advice of your own attorney or tax expert if you wish to do so. You may also want to review your Employee Benefit Plans booklet.

This brochure summarizes The 1987 Amoco Oil Company Workforce Reduction Program and the benefit plan provisions in effect for eligible employees.

THE 1987 AMOCO OIL COMPANY WORKFORCE REDUCTION PROGRAM

The effective dates for the 1987 Amoco Oil Company Workforce Reduction Program are April 1, 1987, through January 1, 1988. This Program, which supersedes and

replaces any prior workforce reduction or severance allowance policies or programs, shall consist of:

Voluntary Terminations

Employees will be eligible to receive benefits under this Program who, during the term of the Program, voluntarily terminate their employment with the consent of the Company. In this connection, it should be recognized that some employees who may seek to voluntarily terminate their employment during the term of this Program will not be eligible for the Program's benefits if the Company determines that their continued employment with the Company is in the Company's interest.

Involuntary Terminations

Involuntary terminations shall occur as determined by the Company. Involuntary terminations may include retirement eligible employees.

GENERAL LIMITATION

The 1987 Amoco Oil Company Workforce Reduction Program is in effect from April 1, 1987, through January 1, 1988. It supersedes and replaces any prior workforce reduction or severance allowance policies or programs.

The special benefits of the Program are available only to regular full-time employees in Amoco Oil Company who retire or terminate as a result of this Program, who continue to work until their services are in the opinion of the Company no longer required, and who enter into an Employee Termination Agreement. The Program is not available to:

(1) employees whose employment is terminated for reasons unrelated to the Workforce Reduction Program;

(2) casual, temporary or part-time employees;

(3) employees who die prior to the date his or her employment would have otherwise terminated as a result of this Program;

(4) employees determined by the Company to be eligible for benefits under the Long-Term Disability Plan (or, in the case of non-LTD participants, eligible for disability benefits under the Employee Retirement Plan) prior to the date his or her employment might have otherwise terminated voluntarily or involuntarily because of a workforce reduction; or

(5) employees determined by the Company to be potentially eligible for benefits under the Long-Term Disability Plan (or in the case of non-LTD participants, potentially eligible for disability benefits under the Employee Retirement Plan) prior to the date his or her employment might have otherwise terminated voluntarily or involuntarily because of a workforce reduction – in which event a decision with respect to benefits under the 1987 Amoco Oil Company Workforce Reduction Program will be deferred until such time as a final decision is made with respect to his or her eligibility to receive benefits either under the Long-Term Disability Plan or the Employee Retirement Plan.

SPECIAL BENEFITS

Special benefits are being offered to those employees who either voluntarily terminate or are involuntarily terminated during this Program, subject to their entering into the Employee Termination Agreement described below. These benefits include a severance allowance, consent retirement with a deferral available for those electing either a monthly annuity or a single (lump-sum) distribution of annuity benefits, extended medical insurance coverage, and extended life insurance coverage. The details of this aspect of the Program shall consist of:

1. Severance

The following severance allowance will be paid to eligible employees:

Credited Service(1)	Weeks' of Pay(2)	Credited Service(1)	Weeks' of Pay(2)	Credited Service(1)	Weeks' of Pay(2)
½ to 1 yr.	15.5	13 years	33.5	25 years	56
2 years	17	14 years	35	26 years	58
3 years	18.5	15 years	36.5	27 years	60
4 years	20	16 years	38	28 years	62
5 years	21.5	17 years	40	29 years	64
6 years	23	18 years	42	30 years	66
7 years	24.5	19 years	44	31 years	68
8 years	26	20 years	46	32 years	70
9 years	27.5	21 years	48	33 years	72
10 years	29	22 years	50	34 years	74
11 years	30.5	23 years	52	35 years	76
12 years	32	24 years	54	36 or more years	78

1. "Credited Service" is based on the service anniversary date nearest the date of termination. Fractional years of service of six months or more will be rounded to the next higher service years. Fractional years of service of less than six months will be disregarded. "Credited Service" means service with the Company as determined from the records of the Company and in accordance with such rules and regulations as may from time to time be in effect.

2. "Weeks' of Pay" means the employee's regular salary or hourly rate, excluding overtime and all other types of premium or extra payments (including bonuses), computed on a weekly basis.

Timing and Method of Payment

The Company may elect to make the severance payment in a single (lump) sum or in installments, but consideration will be given to how the employee would prefer to receive the payment. In either case, severance will be completely paid no later than 24 months after your employment ends. If death occurs before the entire severance allowance is paid, the unpaid balance will be paid to the designated beneficiary.

2. Consent Retirement and Deferral of Annuity Benefit

Those employees with 20 or more years of credited service with Amoco who qualify for benefits under this Program are eligible for Consent Retirement under the terms of the Employee Retirement Plan. In addition to the regular benefit plan provisions that apply to "retirees"

such as those described below, eligible employees who leave with Consent Retirement status may elect to receive their annuity benefit as follows:

a) in monthly payments to commence immediately or deferred to start the first day of any month before the month in which he or she attains age 65, or

b) in a lump-sum payable immediately or deferred to the first day of the month following the month the employee attains age 55. If the lump-sum payment is deferred to age 55, upon attaining age 55 he or she may revoke the election and choose to receive the annuity benefit in monthly payments to start immediately or deferred to start the first day of any month before the month in which he or she attains age 65.

The Deferral-Period 50% Joint and Survivor Spouse Annuity provision of the Employee Retirement Plan will be in effect for employees who defer receipt of annuity benefit (i.e., if married to the spouse for at least one year, a 50% joint and survivor monthly annuity will be payable to the spouse; if the marriage requirement is not met, or if the employee does not have a spouse, no form of annuity benefit is payable, other than the return of employee contributions made to the Plan plus interest, if any).

3. Medical Insurance

Employees who attain "retiree" status (Age 65, Post Age 65, 75-Point, or Consent) are eligible to continue medical insurance coverage in accordance with existing benefit plan provisions.

Terminees who do not attain "retiree" status can continue their medical insurance coverage for themselves and eligible dependents until the earlier of: 1) the date medical coverage begins under a group plan with another employer, or 2) one year after termination of service with the Company. Terminees are required to make the applicable employee contributions, and coverage will cease if payments are not received in a timely manner. If the terminee does not have medical coverage under a new group plan at the end of one year, the terminee may continue group medical coverage with the Company for an additional six-month period. In this case, the terminee would be required to pay the Company in a timely manner an amount equal to 102 percent of the cost of the continued coverage.

4. Life Insurance

Employees who depart with "retiree" status (Age 65, Post Age 65, 75-Point, or Consent) are eligible to continue certain levels of life insurance in accordance with existing benefit plan provision.

Terminees who do not have "retiree" status can receive life insurance for themselves equal to one times the annual rate of pay in effect at the time of termination. This coverage can continue until the earlier of: 1) the date life insurance coverage begins under a group plan with another employer, or 2) one year after termination of service with the Company. Terminees are required to make the applicable employee contributions, and coverage will cease if payments are not received in a timely manner.

EMPLOYEE TERMINATION AGREEMENT

To ensure that both the Company and those employees who may be directly affected by the 1987 Amoco Oil Company Workforce Reduction Program have their rights and obligations established with certainty and finality, the Company is offering the Special Benefits described above as consideration in return for the execution of the Employee Termination Agreement set forth below. By entering into the Agreement, affected employees, whether they voluntarily terminate their employment or are involuntarily terminated, are agreeing not to pursue any claim against the Company.

Employees who feel that they should not have been selected for termination under the Program, or who feel that they have not been treated fairly, do not have to sign the Employee Termination Agreement. If they do not, however, only the provisions of our regular benefit plans set forth in the Employee Benefit Plans booklet will be applicable to their termination, and they shall not be entitled to receive the Special Benefits.

The terms of the Employee Termination Agreement are as follows:

EMPLOYEE TERMINATION AGREEMENT

Amoco Oil Company ("Amoco" as explained below) and the undersigned employee hereby agree as follows:

> Amoco will provide the benefits described in its brochure captioned "The 1987 Amoco Oil Company Workforce Reduction Program" to the undersigned employee in accord with the terms

and provisions of the brochure itself, including the payment of a severance allowance in the amount of $ 71207[36] [50] RKC JLR. 10/27/87

(The Employee), in exchange, agrees not to commence any grievance, government administrative proceeding or lawsuit and, without any reservation whatsoever, forever releases and waives any claim or liability against Amoco arising out of, prior to, or because of the termination of employment, or in anticipation of continued or future employment, or for employment with any Amoco affiliate, whether such claim or liability is currently known or unknown.

The reference to "Amoco" in this Agreement is mutually understood and intended to include not only Amoco Corporation but also all subsidiaries thereof identified by the Amoco trade name as well as any present or former benefit plan, officer, employee or other agent of any "Amoco" company.

This Employee Termination Agreement ("Agreement" herein) will supersede any and all obligations Amoco might otherwise owe to the undersigned employee for any act or omission whatsoever that took place or should have taken place on or before April 1, 1987, or the date this Agreement is signed and executed by the employee, whichever is later, except for any claim for unemployment compensation or workers compensation administered by a state government to which the undersigned employee is presently or may become entitled or any employee pension or retirement plan claim within the meaning of Section 3(2)(a) of the Employee Retirement Income Security Act of 1974, as amended, 29 USC Sec. 1002(2)(a).

Some employees have previously entered into written agreements with Amoco which set forth

specific obligations governing the Disclosure and Processing of Inventions, Non-Disclosure or Personal Use of Company Information, and the Possession and Surrender of Company Information. The employee entering into this Agreement recognizes that nothing herein alters the employee obligations contained in such prior agreements in any way and specifically reaffirms all such obligations.

An Employee entering into this Agreement acknowledges that he or she has received a copy of the brochure captioned "The 1987 Amoco Oil Company Workforce Reduction Program", has read and understands it, and has had ample opportunity to seek out the counsel of his or her own choice. Both parties further agree that this Agreement represents the entire agreement between the parties setting forth any Amoco obligation to the employee, that there are no other written or oral agreements between the parties, and that any future dispute which hereinafter arises with respect to either the termination of employment or this Agreement shall be resolved solely in accord with the terms and provisions of this Agreement, as supplemented by the brochure captioned "The 1987 Amoco Oil Company Workforce Reduction Program", subject only to whatever law governs the State of Illinois as of the date of the execution of this Agreement.

Both Amoco and the undersigned employee knowingly and voluntarily execute this Agreement, in accord with the above-described terms on this 27 day of October, 1987.

/s/ Jose L. Roy Jr.
Employee

/s/ R. Kent Carson
Amoco Representative

No employee should sign the Agreement unless he or she understands its provisions and knowingly and freely agrees to waive whatever rights the terminee might otherwise have against the Company. The Agreement must not be altered in any way.

The Employee Termination Agreement means what it says, and nothing less. So that there is no misunderstanding, all who sign are agreeing not to sue, etc., over any claim or liability whatsoever not specifically excluded in the Employee Termination Agreement. This Agreement seeks to avoid all possible grievances, charges of unfair treatment, government investigations, lawsuits – every possible disagreement that can arguably be resolved between an employer and an employee – whether valid or not. By way of example, this Agreement is intended to govern any rights under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act, ERISA, or any other federal labor law, or state common law or statutory claims to the extent not specifically excluded in the Employee Termination Agreement.

Your supervisors and the Human Resources staff are available to discuss the Agreement with you. If any questions you may have are not answered satisfactorily, those of you who may be directly affected are encouraged to seek out the independent counsel of your choice for further advice.

All questions arising out of this Program will be reviewed at local management's discretion and no other agreements between Amoco and employees who leave the workforce are authorized hereunder.

BENEFITS AVAILABLE TO ALL RETIREES AND TERMINEES

Certain regular benefits are available to all employees who retire or terminate from Amoco. These benefits are described in greater detail in the Amoco Employee Benefit Plans booklet (40-999-4(12/84)). These benefits consist of unused vacation pay, Educational Assistance payments, Retirement Plan, Savings Plan and ESOP benefits and the opportunity to convert life and medical insurance to an individual policy.

AMENDMENT OR TERMINATION

The Company reserves the right to amend, modify, suspend, or discontinue this Program at any time and any such action shall apply to existing as well as to future employees, but any severance allowance which is being paid under this Program at the time such action is taken shall continue to be paid in accordance with the Program as if it was in effect at the termination of employment upon which such allowance is based.

ERISA STATEMENT

The following paragraphs contain specific information required by the Employee Retirement Income Security Act of 1974 (ERISA). That Act mandates that this information be transmitted to employees as part of any summary benefit plan description.

The name of the plan is the 1987 Amoco Oil Company Workforce Reduction Program.

The sponsor and administrator of the plan is Amoco Corporation, 200 East Randolph Drive, Chicago, Illinois 60601 (telephone: (312) 856-6111), and that company's corporate secretary at the above address is designated as agent for service of legal process. Service of legal process may also be made upon the plan administrator.

The employer identification number (EIN) assigned by the Internal Revenue Service is: 36-1812780.

An employee is entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA provides that an employee shall be entitled to:

> Examine, without charge, at the plan administrator's office all plan documents and copies of all documents filed by the plan administrator with the U.S. Department of Labor, such as detailed annual reports and plan descriptions.
>
> Obtain copies of all plan documents and other plan information upon written request to the plan administrator. The administrator will state the charge for specific documents on request so that an employee can find out the cost before ordering.

In addition to creating rights for plan participants, ERISA imposes duties upon the people who are responsible for the operation of the plan. The people who are responsible for the operation of the plan, called "fiduciaries" of the plan, have a duty to do so prudently and in the interest of employees and other plan participants and beneficiaries. No one may discriminate against employees in any way to prevent employees from obtaining a plan benefit to which employees are entitled or exercising their rights under ERISA. If an employee's claim for a plan benefit is

denied in whole or in part, the employee must receive a written explanation of the reason for the denial.

Under ERISA, there are steps an employee can take to enforce the above rights. For instance, if an employee requests material from the plan and does not receive them within 30 days, the employee may file suit in a federal court. In such a case, the court may require the plan administrator to provide the materials and pay the employee up to $100 a day until the employee receives the materials, unless the materials were not sent because of reasons beyond the control of the administrator.

If an employee has a claim for benefits that is denied or ignored, in whole or in part, the employee may file suit in a state or federal court. If it should happen that plan fiduciaries misuse a plan's money, or if the employee is discriminated against for asserting his or her rights, the employee may seek assistance from the U.S. Department of Labor, or the employee may file suit in a federal court. The court will decide who should pay court costs and legal fees. If the employee is successful, the court may order the person sued to pay these costs and fees. If the employee loses, the court may order the employee to pay these costs and fees, for example, if it finds the claim is frivolous.

If an employee has any questions about this plan, the employee should contact the plan administrator. If the employee has any questions about this statement or about his or her rights under ERISA, the employee should contact the nearest Area Office of the U.S. Labor – Management Services Administration, Department of Labor.

BENEFIT PLAN CLAIM PROCEDURES

The Employee Retirement Income Security Act (ERISA) requires a Company to identify the administrator of any ERISA-regulated benefit plan and to set forth a claim procedure for resolving ERISA benefit plan problems. Amoco Corporation, P.O. Box 87257, Chicago, Illinois 60680, is the administrator of the benefit plan provisions of the 1987 Amoco Oil Company Workforce Reduction Program for the purpose of meeting this ERISA requirement. In the event an ERISA claim is necessary, it must be in writing and sent to the Amoco Corporation Personnel Records Center for initial consideration.

If a claim is denied in whole or in part, written notice of the denial will be furnished to the claimant within a reasonable time.

A claimant or his authorized representative has 60 days after receipt of written notice of the denial of a claim to request a review of the denial by making written application to the Personnel Records Center of the plan administrator at the above address. The application will be considered by a named fiduciary designated by the Company for review of denied claims. The decision will be made not later than 60 days after receipt of the request for review; provided that if special circumstances require an extension of time for processing, the decision will be rendered as soon as possible but not later than 120 days after receipt of the request for review.

I. Statutory Provisions Involved

AGE DISCRIMINATION FOR EMPLOYMENT ACT § 2, 29 U.S.C. § 621

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that –

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers

find ways of meeting problems arising from the impact of age on employment.

---

§ 4(f)(2), 29 U.S.C. § 623(f)(2)

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization –

> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

---

§ 4(f)(2)(B), 29 U.S.C. § 623(f)(2)(B) (1990)

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization –

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section –

* * *

(B) to observe the terms of a bona fide employee benefit plan –

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter;

---

§ 7(d)(2), 29 U.S.C. § 626(d)(2)

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed –

* * *

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

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§ 12(a), 29 U.S.C. § 631(a)

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

ORDER WORKERS PROTECTION ACT

Title II – Waiver of Rights of Claims
P.L. 101-433, 104 Stat. 983 (Oct. 16, 1990)

SEC. 201. WAIVER OF RIGHTS OR CLAIMS.

Section 7 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626) is amended by adding at the end the following new subsection:

"(f)(1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum –

> "(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> "(B) the waiver specifically refers to rights or claims arising under this Act;
>
> "(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
>
> "(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
>
> "(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
>
> "(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

"(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

"(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

"(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to –

"(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

"(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

"(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum –

"(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

"(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

"(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

"(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.".

29 U.S.C. 626 note.

SEC. 202. EFFECTIVE DATE.

(a) IN GENERAL. – The amendment made by section 201 shall not apply with respect to waivers that occur before the date of enactment of this Act.

(b) RULE ON WAIVERS. – Effective on the date of enactment of this Act, the rule on waivers issued by the Equal Employment Opportunity Commission and contained in section 1627.16(c) of title 29, Code of Federal Regulations, shall have no force and effect.

(2)

Supreme Court, U.S.
FILED
JUL 24 1991
OFFICE OF THE CLERK

No. 90-1978

In The

Supreme Court of the United States

October Term, 1991

JOSE L. ROY,

Petitioner,

vs.

AMOCO OIL COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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July 25, 1991

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Eleventh Circuit, in affirming the district court's finding that only one alleged violation of the ADEA occurred in this case and that it took place more than 300 days prior to the filing of the plaintiff's EEOC charge, "decided an important question of federal law which has not been, but should be, settled by this Court" or "decided a federal question in a way that conflicts with applicable decisions of this Court"?

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INTRODUCTION

The petitioner, Jose Roy ("Roy"), alleged in his Complaint that he was forced to take early retirement from his employment with the respondent, Amoco Oil Company ("Amoco"), in violation of § 4(f)(2) of the Age Discrimination in Employment Act of 1967 ("ADEA"). Roy's ostensible election to take early retirement was manifested by his signing of an early retirement letter on September 24, 1986. Roy claimed that he was coerced into signing the letter. However, Roy did not file an administrative charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") until August 1, 1988, which was 675 days after his signing the letter. As a result, Amoco argued before the district court that Roy's EEOC charge was not filed within 300 days "after the alleged unlawful employment practice occurred," as required by § 7(d)(1) of the ADEA.

In order to overcome this untimeliness problem, Roy was forced to argue that a separate ADEA violation had occurred within the 300-day period preceding the filing of his EEOC charge. To that end, Roy pointed to a supplemental severance payment program which Amoco made available to him within the 300-day period.

Under the terms of the supplemental program, Roy was offered a lump sum severance payment of $71,207 in exchange for his signing a release of legal claims against Amoco. The severance payment was offered to Roy *in addition to* his regular pension, which was payable to him beginning with his retirement on January 1, 1988 *regardless* of whether he chose to participate in the severance payment program. Approximately two months before the

date of his retirement, Roy in fact did elect to participate in the severance payment program. He signed a release and eventually received a lump-sum payment of $71,207.

Roy tried to convince the district court that the supplemental severance payment program was a separate ADEA violation because he allegedly was coerced into participating in the program. The district court rejected this argument because, even if Roy's allegation about coercion were accepted as true, the severance payment program was not the "alleged unlawful employment practice" that prompted his early retirement.

Roy renewed the same argument before the Eleventh Circuit, but it was summarily rejected. Roy now seeks to raise the argument here for a third time. This Court also should reject it. Certiorari is not intended to be a vehicle for litigants simply to reargue positions that already have been rejected by the courts below. Moreover, contrary to Roy's assertions in his petition, there is nothing in the Eleventh Circuit panel's decision that "decided an important question of federal law which has not been, but should be, settled by this Court" or that "decided a federal question in a way that conflicts with applicable decisions of this Court."[1]

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[1] Arguably, the Eleventh Circuit panel did not decide *any* question of federal law in the sense contemplated by Rule 10.1(c) of the Rules of the Supreme Court of the United States. The Eleventh Circuit panel merely issued a *per curiam* affirmance of the district court's decision, without any written opinion.

STATEMENT OF THE CASE

The gravamen of Roy's Complaint under the ADEA was that he was "forced to accept involuntary retirement." [App. 20a].[2] Likewise, in the Joint Pre-Trial Stipulation, the parties agreed that Roy's lawsuit was premised on the allegation that he was "forced to retire." [App. 27a].

Following the completion of discovery, Amoco filed a summary judgment motion. The motion was based on three separate grounds, namely: (1) that Roy's EEOC charge was not filed within 300 days after his allegedly forced decision to take early retirement; (2) that Roy had signed a release of all claims against Amoco, including those arising under the ADEA; and (3) that Roy had not rescinded the release by tendering back to Amoco the $71,207 that he received in exchange for his signing of the release.

In his response to Amoco's untimeliness argument, Roy asserted two basic positions. First, Roy argued that his early retirement actually had been accomplished by means of a supplemental severance payment program in which he elected to participate (allegedly under coercion) in October, 1987, rather than by means of an early retirement letter that he signed in September, 1986. [App. 14a]. Second, Roy argued that even if the limitations period began to run in September, 1986, when he signed the early retirement letter, the violation was continuing

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[2] References in brackets are to the numbered pages of the Appendix to Roy's petition for a writ of certiorari.

because he asked Amoco within the 300-day period preceding the filing of his EEOC charge to allow him to remain in its employ. [App. 17a].[3]

The district court rejected Roy's arguments. First, based on the undisputed facts, the district court found as a matter of law that "the date for calculating the commencement of the statute of limitations period is September 24, 1986." [App. 16a]. The district court also found that Roy "filed the EEOC charge on August 1, 1988, almost two years after the date on which the court has determined the 'alleged unlawful [employment] practice occurred.' Therefore, pursuant to 29 U.S.C. § 626(d)(1), the Plaintiff's EEOC was not timely filed. Accordingly, the Plaintiff's present action is time barred." [App. 16a-17a].

With respect to Roy's second response to Amoco's untimeliness argument, the district court found that Roy's request to remain in Amoco's employ did not constitute a continuing violation that fell within the 300-day period preceding the filing of his EEOC charge. Accordingly, Roy's filing of the EEOC charge was found to be untimely. [App. 17a].

Because these rulings effectively disposed of Roy's lawsuit, the district court declined to address the other two grounds raised in Amoco's summary judgment motion. [App. 12a].

---

[3] This was a different "continuing violation" argument than the one that Roy now makes in his petition for a writ of certiorari.

On appeal, the Eleventh Circuit panel issued a *per curiam* affirmance Order without any written opinion. [App. la]. The Eleventh Circuit also denied Roy's motion for rehearing and suggestion of rehearing *en banc*. [App. 2a-3a].

In his petition for a writ of certiorari, Roy continues to argue, both explicitly and implicitly, that his allegedly coerced participation in the supplemental severance payment program was a separate ADEA violation, and that it was the means by which Amoco forced him into early retirement.[4] Based on that faulty premise, which already has been rejected by both the district court and the Eleventh Circuit panel, Roy then proceeds to argue that the law has been misapplied to this presumed factual scenario.

---

[4] For example, on page 3 of his petition, Roy states that he was "required to sign the [severance payment program documents] agreeing to sever his employment by way of early retirement. . . . " On page 6, Roy refers to "the incentive program through which the retirement was accomplished. . . . " On page 8, Roy states that he "ostensibly voluntarily agreed to retire by entry into an early retirement incentive program. . . . " On page 14, Roy states that "no legitimate reason existed for forcing [him] to retire in 1987." On page 15, Roy refers to "AMOCO's use of the [severance payment program] to force other individuals to retire. . . . " At best, these statements are merely repetitions of the same argument that already has been rejected by the district court and the Eleventh Circuit panel. At worse, they are disingenuous distortions of the record that are calculated to give a false impression about what the courts below decided. *Amoco asserts that each of the statements quoted above is a "misstatement of fact or law" within the meaning of Rule 15 of the Rules of the Supreme Court of the United States.*

REASONS FOR DENYING THE WRIT

1. No Conflict With Applicable Supreme Court Decisions

In the petition, at pages 10-15, Roy argues that the decisions of the district court and the Eleventh Circuit panel are "in direct contravention" of this Court's decisions in *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L.Ed.2d 431 (1980) and *Chardon v. Fernandez*, 454 U.S. 6, 102 S. Ct. 28, 70 L.Ed.2d 6 (1982). Amoco disagrees.

Both *Ricks* and *Chardon* held that in determining the proper accrual date for the limitations period in an employment discrimination action, it is necessary to focus "on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful." 102 S. Ct. at 29 (emphasis in original). In *Ricks* and *Chardon*, the plaintiffs' actions were held to be time-barred because, while their actual terminations of employment took place within the respective limitations periods, the plaintiffs had received notice of their employers' allegedly discriminatory conduct much earlier, at a point in time outside the limitations periods. The plaintiffs' actual terminations were held to be merely the delayed effects of the earlier discriminatory conduct.

Roy claims that the instant action is distinguishable from *Ricks* and *Chardon* because he alleged that a separate and distinct ADEA violation occurred within the limitations period. Amoco readily acknowledges that Roy made such an allegation. As explained above, however, both the district court and the Eleventh Circuit panel rejected Roy's claim. They held that there was *only one* allegedly

discriminatory act, and that it took place outside the limitations period. Thus, the holding in this action is entirely consistent with *Ricks* and *Chardon*.

Roy also argues, at pages 17-18 of the petition, that the opinions of the district court and the Eleventh Circuit panel "collide" with this Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S. Ct. 1114, 71 L.Ed.2d 214 (1982). Again, Amoco disagrees.

In *Havens Realty*, this Court reaffirmed the basic soundness of the "continuing violation" principle. It held that a defendant in a discrimination action can be held liable for the entire course of a continuing pattern of discriminatory conduct so long as one discrete act that was a part of the pattern was carried out within the limitations period.

Roy claims that he is entitled to rely on the "continuing violation" theory because one discrete act in Amoco's alleged "company-wide policy of discrimination" – namely, his allegedly coerced participation in the supplemental severance payment program – occurred within the 300-day period preceding the filing of his EEOC charge. There are, however, two fundamental flaws in Roy's argument. First, neither of the courts below found that the severance payment program was discriminatory. Second, even if they had, there was no evidence that the severance payment program was linked to Roy's early retirement decision in the sense that it caused or motivated the decision. Indeed, the evidence before the district court was that Amoco's early retirement program and the severance payment program were conceptually and practically distinct from one another.

2. No Need To Settle Important Questions Of Federal Law

Roy also argues, at page 9 of the petition, that the courts below decided "important question[s] of federal law which [have] not been, but should be, settled by this Court." In particular, Roy argues that "the District Court and Court of Appeal have fashioned a new rule for charge-filing purposes" by holding that a separate and discrete ADEA violation which occurred within the limitations period was merely a "delayed, but inevitable, consequence" of earlier discriminatory conduct that occurred outside the limitation period; and by holding that "there may be but one [ADEA] violation only" in any one lawsuit. Amoco disagrees.

Roy's first argument is premised on the assumption that the courts below found that the severance payment program was a separate and discrete ADEA violation. However, they did not. In fact, despite Roy's persistent efforts, the courts below specifically rejected that argument. Having done so, the district court and the Eleventh Circuit panel followed well-settled precedent in finding that the only identified "unlawful employment practice" – namely, Roy's allegedly coerced signing of the early retirement letter – fell outside the 300-day limitations period.

Roy's second argument is patently frivolous. There is nothing in the district court's opinion or in the Eleventh Circuit panel's affirmance which suggests that "there may be but one violation only" in an action under the ADEA. The courts below merely held, based on the facts of *this*

particular case, that only one alleged violation occurred here. There was no generalization of that limited finding.

3. No Need To Resolve Hypothetical Issue

On pages 10-11 of the petition, Roy describes a hypothetical situation that apparently is intended to point out a fallacy of this Court's discussion in *Ricks* about why the "delayed, but inevitable, consequence" of an unlawful employment practice does not itself constitute a new violation. According to Roy, after the decisions of the courts below, "employers are now free" to coerce employees who are under age 40, and thus unprotected by the ADEA, by forcing them to agree to take early retirement at some designated future date after they have reached age 40. Then, when the time comes to force the employees to retire pursuant to their earlier agreements, the employees would have no legal recourse because the "unlawful employment practice" happened years earlier, when they were under age 40.

Aside from the far-fetched nature of his hypothetical situation, it has nothing whatever to do with the facts of the instant action. Roy was well over 40 years old, and thus was covered by the protections of the ADEA, when he signed the early retirement letter in September, 1986, allegedly under coercion. If he had filed his EEOC charge within 300 days following that act, as the law requires, this action would have been timely.

It is a well-settled principle of Supreme Court jurisprudence that the Court will not decide hypothetical issues of the sort that Roy has raised here. *Alabama State*

Federation of Labor v. McAdory, 325 U.S. 450, 65 S. Ct. 1384, 1389, 89 L.Ed. 1725 (1945); *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 89 S. Ct. 518, 527, 21 L.Ed.2d. 474 (1969).

4. Irrelevance Of Older Workers' Benefit Protection Act

In the petition, at pages 7-8 and 17, Roy suggests that this action somehow involves the Older Workers' Benefit Protection Act, 29 U.S.C. § 626(f)(1), which was enacted by Congress in 1990. However, it does not.

Amoco did assert as one of the grounds for its summary judgment motion that Roy executed a release of his legal claims, including those arising under the ADEA. Neither the district court nor the Eleventh Circuit panel addressed that issue, however, because the district court's ruling on the untimeliness of Roy's EEOC charge disposed of the entire action. Therefore, the issue of whether Roy might have invoked the Older Workers' Benefit Protection Act in arguing that the release was unenforceable is irrelevant to this action.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that Roy's petition for a writ of certiorari should be denied.

Respectfully submitted,

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